DOCKET

No. 07-210
Title: John Bridge, et al., Petitioners
v.
Phoenix Bond & Indemnity Co., et al.
Docketed: August 17, 2007
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (06-1160)
Decision Date: February 20, 2007
Rehearing Denied: April 17, 2007
Discretionary Court
Decision Date: December 21, 2005
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jun 29 2007	Application (07A4) to extend the time to file a petition for a writ of certiorari from July 16, 2007 to August 15, 2007, submitted to Justice Stevens.
Jul 3 2007	Application (07A4) granted by Justice Stevens extending the time to file until August 15, 2007.
Aug 15 2007	Petition for a writ of certiorari filed. (Response due September 17, 2007)
Sep 11 2007	Order extending time to file response to petition to and including October 17, 2007.
Oct 15 2007	Order further extending time to file response to petition to and including November 16, 2007.
Nov 16 2007	Brief amicus curiae of McKesson Corporation filed.
Nov 16 2007	Brief of respondents Phoenix Bond & Indemnity Co., et al.
Nov 28 2007	DISTRIBUTED for Conference of January 4, 2008.
Dec 6 2007	Reply of petitioners John Bridge, et al. filed. (Distributed)
Jan 4 2008	Petition GRANTED limited to the following Question: "Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the plaintiff." The brief of petitioners is to be filed on or before Thursday, February 14, 2008. The brief of respondents is to be filed on or before Wednesday, March 12, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Jan 30 2008	SET FOR ARGUMENT ON Monday, April 14, 2008.
Feb 5 2008	Record received from the U.S.C.A for the 7th Circuit. (1 box)
Feb 14 2008	Joint appendix filed. (Joint appendix in two volumes).
Feb 14 2008	Brief of petitioner John Bridge, et al. filed.
Feb 21 2008	Brief amicus curiae of McKesson Corporation filed.
Feb 21 2008	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Feb 21 2008	Brief amicus curiae of Washington Legal Foundation filed.
Mar 12 2008	Brief of respondents Phoenix Bond & Indemnity Co., et al. filed.
Mar 18 2008	Brief amicus curiae of International Association of Insurance Receivers filed. (Distributed)
Mar 19 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 19 2008	Brief amicus curiae of the United States filed. (Distributed)

Mar 19 2008	Brief amicus curiae of National Association of Shareholder and Consumer (Distributed) Attorneys filed.
Mar 19 2008	Brief amici curiae of Connecticut, et al. filed. (Distributed)
Mar 20 2008	CIRCULATED.
Mar 25 2008	Record received from the U.S.D.C. for the Northern District of Illinois.
Mar 31 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 7 2008	Reply of petitioners John Bridge, et al. filed. (Distributed)
Apr 14 2008	Argued. For petitioners: Theodore M. Becker, Chicago, Ill. For respondents: David W. DeBruin, Washington, D.C.; and Eric D. Miller, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED

No. 07-210 AUG 15 2007

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In the Supreme Court of the United States

SABRE GROUP, LLC, *et al.*,
Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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August 15, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether a plaintiff asserting a civil RICO claim predicated on acts of mail fraud must plead and prove reliance on alleged misrepresentations by the defendant?

PARTIES TO THE PROCEEDINGS

Petitioners are Sabre Group, LLC; Barrett Rochman; and John Bridge. Other parties in the court of appeals were Plaintiffs-Appellants Phoenix Bond & Indemnity Co. and BCS Services, Inc. and Defendants-Appellees Robert Jensen; Joseph Varan; Jeffrey Bridge; Francis Alexander; Jesse Rochman; Douglas Nash; Cronus Projects, LLC; Gregory Ellis; GJ Venture, LLC; L.C.C. Venture, LLC; Regal One, LLC; Jason Baumbach; Optimum Financial, Inc.; Carpus Investments, LLC; DRN II, Inc.; Jeshay, LLC; Mud Cats Real Estate, LLC; Georgetown Investors, LLC; Corinne Rochman; Christopher Rochman; BRB Investments, LLC; and CCJ Investments, LLC.

The court of appeals dismissed Plaintiff-Appellant Oak Park Investments, Inc. as a party.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Sabre Group, LLC has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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In the Supreme Court of the United States

No. ___

SABRE GROUP, LLC, *et al.*,
Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners, by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-8a) is reported at 477 F.3d 928. The opinion of the district court (App. B, 9a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2007. On April 17, 2007, the court of appeals denied petitioners' request for rehearing *en banc*. App. C,

22a-23a. On July 3, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 15, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

> As used in this chapter—(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . .

18 U.S.C. § 1961 (1988).

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . .

18 U.S.C. § 1964(c) (1995).

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1341 (2002).

STATEMENT OF THE CASE

When property owners in Cook County, Illinois do not timely pay their real estate taxes, the County acquires a tax lien on the property involved. Cook County sells these tax liens to third parties at auction. The winning bidder pays the delinquent taxes to the County and has the right to collect the amount of the taxes paid, plus interest and a penalty, from the property owner. The auction award goes to the bidder who is willing to accept the smallest percentage penalty on top of the tax lien. App. 1a. If the property owner is unable to pay, the lien holder may obtain a tax deed and become the new owner of the property.

The auctions for tax liens in Cook County are highly competitive. Many bidders submit offers at the statutorily imposed minimum of a 0% penalty. When the County receives multiple bids at 0%, it allocates the tax liens among the low bidders.

The tax liens auctions are administered by the County Treasurer. Among the procedures the Treasurer has implemented for conducting the auctions is the Single, Simultaneous Bidder Rule ("SSB Rule"), requiring bidders to declare that they are not related to any other entity that participates in the auction. App. 2a.

On July 15, 2005, Phoenix Bond & Indemnity Co. and BCS Services, Inc. ("Plaintiffs") filed this action in the United States District Court for the Northern District of Illinois. They alleged that petitioners and several other defendants violated the SSB Rule by agreeing to participate in the auctions and later to transfer the liens they were awarded to a single entity. Defendants allegedly did so while representing to the County that they were complying with the SSB Rule. Plaintiffs alleged that, as a result of this arrangement, they received less than the share of liens they would have been awarded if defendants had complied with the SSB Rule.

Plaintiffs alleged that defendants had engaged in the operation of an enterprise through a pattern of racketeering activity (namely, mail fraud), in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"). The only mailings alleged by plaintiffs were routine notices mailed by the County to notify property owners of tax lien sales. These mailings did not go to plaintiffs and are not even alleged to have contained any misrepresentations. Plaintiffs did not and could not allege that they ever received any fraudulent misrepresentations from defendants, much less that they relied on any such misrepresentations. Plaintiffs filed their action under 18 U.S.C. § 1964, the civil provision of the RICO statute, which authorizes persons injured in their business or property "by reason of" a criminal RICO violation to recover treble damages and attorneys' fees.

The district court dismissed the complaint under Rule 12(b) for lack of standing and absence of federal jurisdiction. App. 18a. The court of appeals reversed and remanded, holding that Plaintiffs were not required to plead and prove reliance on alleged misrepresentations by defendants as a prerequisite for pursuing a civil RICO claim predicated on alleged acts of mail fraud. App. 8a.

REASONS FOR GRANTING THE PETITION

This case presents an important issue regarding the breadth of the civil RICO statute and the relationship between federal criminal law and traditional state law claims. This Court already has acknowledged the importance of the question presented. Last year, in *Anza v. Ideal Steel Supply Corp.*, ___ U.S. ___, 126 S. Ct. 1991, 1998 (2006), this Court observed that there is a "substantial question" whether a plaintiff is required to show reliance on an alleged misrepresentation in civil RICO cases where the underlying "racketeering activity"

is based on fraud. The federal courts of appeals have divided sharply on this question, and this Court should now resolve it.

The court of appeals in this case acknowledged the circuit conflict (although it did not agree with petitioners as to how each of the circuits should be classified). As we read the cases, five circuits require a plaintiff to plead and prove reliance on an alleged misrepresentation to satisfy the standing requirements of civil RICO. Three other circuits reject this position, holding that reliance is not a necessary element for a civil RICO case. In these circuits, plaintiffs may pursue treble damages and attorneys' fees under RICO, even though their RICO claims would be dismissed for lack of standing in many other places in the country. This Court's intervention is needed to bring uniformity to the law and to confine civil RICO fraud claims within proper bounds. There is no reasonable prospect that further litigation in the lower courts will resolve the conflict or contribute to this Court's consideration of the issue.

Absent this Court's intervention, prospective plaintiffs will have a significant incentive to forum-shop, and to file civil RICO claims in federal jurisdictions that do not require any showing of reliance as a precondition for treble damage recoveries. Review by this Court is needed not merely to establish consistent elements for civil RICO claims, but also to limit such claims to appropriate circumstances. Permitting plaintiffs to pursue civil RICO claims predicated on fraud without any allegation or showing of reliance on an alleged misrepresentation eliminates a crucial element of common law fraud and does so in the context of a statute that permits treble damage recoveries.

The government, of course, need not establish standing to pursue criminal RICO charges, but, at the same time, the government can exercise prosecutorial discretion to determine which RICO cases to pursue. No such check limits civil RICO claims. A reliance requirement would impose proper

restrictions on the situations in which private plaintiffs can use alleged misstatements to public officials as a basis for a civil RICO claim.

I. THE FEDERAL COURTS OF APPEALS ARE DIVIDED AS TO WHETHER A PLAINTIFF MUST DEMONSTRATE RELIANCE TO BRING A CIVIL RICO CLAIM.

Acknowledging the conflict among the circuits, the court of appeals in this case stated: "The box score is thus four circuits on one side and two on the other [on the question of reliance for civil RICO plaintiffs]; we shall adhere to the majority position. (Changing sides could not eliminate the conflict.)" App. 7a. The court of appeals was correct in recognizing the conflict, although not in identifying which side of the conflict represents the majority rule.

A majority of the circuits that have addressed the question have held that a plaintiff must plead and prove reliance to sustain a civil RICO claim predicated on acts of mail fraud. Early on, for example, the Eleventh Circuit adopted the more "restrictive view," that a plaintiff who brings a RICO claim predicated on mail fraud "must have relied to his detriment on misrepresentations made in furtherance of that scheme." *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991). Four other courts of appeals have agreed. In *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.*, 319 F.3d 205 (5th Cir. 2003), the Fifth Circuit concluded that plaintiffs who were unable to show reliance on any alleged misrepresentation were, as a result, unable to sustain a civil RICO action. *Id.* at 218. The Fourth, Sixth, and Eighth Circuits similarly require a showing of reliance by the plaintiff in a civil RICO case predicated on mail fraud. *See Chisholm v. Transouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Vandenbroeck v. Commonpoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000); *Appletree Square I,*

Ltd. P'ship v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994).

The courts of appeals that have determined that reliance is required in civil RICO cases have reached that conclusion despite acknowledging that the mail fraud statute does not require, as a prerequisite for a *criminal* conviction, any showing that the alleged victim relied on a fraudulent representation. *See Brown v. Cassens Transp. Co.*, No. 05-2089, 2007 WL 1975974, at *2 (6th Cir. July 10, 2007) (observing that this Court held that reliance is not necessary to establish mail fraud in *Neder v. United States*, 527 U.S. 1, 24 (1999)).

Rejecting the approach of these courts, the First, Second, and Seventh Circuits have concluded that reliance is not a necessary element for a plaintiff asserting a civil RICO claim predicated on mail fraud. The First Circuit declared that the RICO statute "says nothing about reliance as a requirement either for civil liability or for proof of damages." *Systems Mgmt., Inc. v. Loiselle*, 303 F.3d 100, 103 (1st Cir. 2002); *see also id.* at 103-04 (recognizing that "at common law a civil action for fraud ordinarily requires proof that the defrauded plaintiff relied upon the deception, and some courts have imported this requirement into RICO actions where the predicate acts comprise mail or wire fraud"). But because the language of RICO's civil action provision does not expressly establish a reliance element, the First Circuit declined to "depart from RICO's literal language by importing a reliance requirement into RICO." *Id.* at 104. The Second Circuit concluded that civil RICO standing is established as long as *someone* allegedly relied on the fraudulent statement; the relying person or entity need not be the plaintiff. In the Second Circuit's view, as long as the plaintiff is able to show that there was a pattern of racketeering activity as defined by the RICO statute, then the plaintiff has standing, even if "the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." *Ideal*

Steel Supply Corp. v. Anza, 373 F.3d 251, 263 (2d Cir. 2004), *rev'd on other grounds*, 126 S. Ct. 1991 (2006).

II. THE RELIANCE QUESTION IS DIRECTLY AT ISSUE IN THIS CASE.

As the present case demonstrates, the conflict among the circuits presents a significant and recurring problem. Adopting the majority approach, the district court in this case determined that the Plaintiffs did not have standing because they could not allege or prove reliance. "The plaintiffs here were not recipients of the alleged misrepresentations and, at best were indirect victims of the alleged fraud. . . . Consequently, the court holds that plaintiffs lack standing to bring the alleged RICO claims." App. 18a. The court of appeals, however, reversed, not because it thought Plaintiffs could allege and prove reliance, but because it held that Plaintiffs need not make any such showing to sustain their civil RICO claim. App. 7a. This case thus squarely presents the legal issue on which the circuits are in conflict.

III. REQUIRING A SHOWING OF RELIANCE IS CONSISTENT WITH THE CIVIL RICO REMEDY.

A. Applying the common law element of reliance is consistent with previous applications of common law concepts to civil RICO.

This Court has recognized that well-established common law concepts should and do apply to civil RICO claims. In *Beck v. Prupis*, this Court held that a plaintiff could not bring a civil RICO claim predicated on § 1962(d) (conspiracy) "for injuries caused by an overt act that is not an act of racketeering or otherwise unlawful under the statute." 529 U.S. 494, 507 (2000). In that case, the plaintiff filed a civil RICO suit against his former employers for dismissing him because he alerted regulators that the employers were en-

gaged in racketeering activities. *Id.* at 498. The plaintiff claimed that his injury was "proximately caused by an overt act—namely, the termination of his employment—done in furtherance of respondents' conspiracy, and that § 1964(c) therefore provided a cause of action." *Id.* at 499. The Court rejected this argument, looking to common law principles of civil conspiracy to support its holding. Specifically, the Court stated that "by the time of RICO's enactment in 1970, it was widely accepted that a plaintiff could bring suit for a civil conspiracy only if he had been injured by an act that was itself tortious." *Id.* at 501. The Court also rejected the plaintiff's argument that the interpretation of the elements for a civil RICO claim should be limited to criminal principles:

> We have turned to the common law of criminal conspiracy to define what constitutes a violation of § 1962(d), a mere violation being all that is necessary for criminal liability. This case, however, does not present simply the question of what constitutes a violation of § 1962(d), but rather the *meaning of a civil cause of action for private injury* by reason of such a violation. In other words, our task is to interpret §§ 1964(c) and 1962(d) in conjunction, rather than § 1962(d) standing alone. The obvious source in the common law for the combined meaning of these provisions is the law of civil conspiracy.

Id. at 501 n.6 (emphasis added). The Court thus distinguished between criminal and civil liability under RICO and ruled that, in the latter context, it is appropriate to look to common law principles in determining the statute's proper reach. Likewise here, it is appropriate to use the common law reliance requirement as a means of setting appropriate bounds for civil RICO liability.

To cite another example, in *Holmes v. Securities Investor Protection Corp.*, this Court applied civil common law principles of proximate cause to civil RICO claims. 503 U.S. 258 (1992). The Court there considered the statutory phrase "by

reason of" in RICO's civil liability provision, § 1964(c), and determined that it required a showing of proximate cause. 503 U.S. at 266. The Court looked not only to statutory history to discern the congressional intent in using the phrase "by reason of," but also to common law principles associated with proximate cause, or the "judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Id.* at 268. The Court recognized that "at common law," proximate cause represented "a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id.* Accordingly, the Court concluded that the "by reason of" language in § 1964(c) incorporated the common law concepts of proximate cause. *Id.* at 276.

This Court thus has recognized that resort to well-established common law principles is an appropriate means of interpreting the reach of the civil RICO statute. In both *Beck* and *Holmes*, the Court specifically identified the common law as persuasive authority in analyzing the standing elements for a civil RICO plaintiff. Indeed in *Beck*, the Court described the common law as an "obvious source" of relevant authority. 529 U.S. at 501 n.6. At the same time, the Court rejected the argument that criminal law concepts are the exclusive source of interpreting the requirements for a civil RICO claim. *Id.* The courts of appeals that have looked solely to criminal law principles in determining whether reliance is a required element of a civil RICO claim predicated on fraud thus have not followed the approach of this Court. *See, e.g., Systems Mgmt.* 303 F.3d at 104 (First Circuit states that "criminal fraud under the federal statute does not require 'reliance' by anyone" and concludes on that basis that reliance is not required of a civil RICO plaintiff either.)

B. Reliance is a well-established principle of common law fraud.

A showing of the plaintiff's reliance on a fraudulent misrepresentation is a longstanding requirement of common law fraud. *See, e.g., Systems Mgmt.*, 303 F.3d at 103 ("At common law a civil action for fraud ordinarily requires proof that the defrauded plaintiff relied upon the deception."); *Chisholm*, 95 F.3d at 337 ("where fraud is alleged as a proximate cause of the injury, the fraud must be a 'classic' one. In other words, the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation."); Restatement (Second) of Torts § 546 (1977) ("The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably *relies upon the truth of the matter misrepresented*, if his reliance is a substantial factor in determining the course of conduct that results in his loss.") (emphasis added).

This showing of reliance is not an incidental one. As the Fifth Circuit has observed, the distinct character of fraud is that it "addresses the liability between persons with direct relationships." *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561 (5th Cir. 2000). Indirect relationships do not have a place in federal civil RICO claims: "Allowing suits by those injured only indirectly would open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but also undermin[e] the effectiveness of treble-damages suits.'" *Holmes*, 503 U.S. at 274 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 545 (1983)) (alteration in original). Because the reliance element ensures that only direct relationships form the basis of a fraud claim, it should be applied to civil RICO claims predicated on fraudulent activity.

IV. A RELIANCE REQUIREMENT IS AN APPROPRIATE LIMITATION OF THE APPLICATION OF THE CIVIL RICO STATUTE.

This Court has noted that Section 1964 was not intended to expand federal jurisdiction into common law fraud without limitation; rather, "private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S 479, 493 (1985). The predicate crimes of the RICO statute, however, cover a broad range of conduct, and civil RICO plaintiffs are not constrained by prosecutorial discretion. "The reach of [the mail and wire fraud statutes] exists against a backdrop of prosecutorial discretion . . . which, if sensitively exercised, operates as a check on improvident exertion of federal power." *Schreiber Dist. Co. v. Serv-well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J. concurring). Prospective civil plaintiffs are unchecked, however, when determining whether to assert a civil RICO claim in a given situation. As then-Judge Kennedy noted, "A company eager to weaken an offending competitor obeys no constraints when it strikes with the sword of [RICO]." *Id.*

The requirement of reliance serves as a "commonsense liability limitation," helping prevent plaintiffs from wielding the threat of treble damages and attorneys' fees in federal court wherever fraud is alleged. *See Summit Props.*, 214 F.3d at 562 ("To hold [that reliance is not required] would allow the threat of treble damages and attorney fees to infiltrate garden variety products liability cases . . . even if no plaintiff relied on those misrepresentations.") As the Fifth Circuit observed, "We are not persuaded that by its 'by reason of' phrase Congress intended such a federalization and escalation of the states' laws of product liability [or other common law claims]." *Id.* Unless civil RICO plaintiffs claiming fraud are required to show reliance on alleged misrepresentations, civil

RICO suits can be expected to over-federalize fraud claims, including claims that would not survive in state court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 15, 2007

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-1160

PHOENIX BOND & INDEMNITY CO. AND BCS SERVICES, INC.,
Plaintiffs-Appellants,

v.

JOHN BRIDGE, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 05 C 4095—James F. Holderman, Chief Judge.

Argued January 16, 2007—Decided February 20, 2007

Before EASTERBROOK, *Chief Judge*, and POSNER and EVANS, *Circuit Judges*.

EASTERBROOK, Chief Judge. Failure to pay property taxes creates a lien for the amount of the unpaid tax (including interest), plus a penalty. Cook County, Illinois, sells tax liens at auction. The bids are stated as percentage penalties that the owner must pay (on top of the taxes and interest) to the winning bidder to clear the lien. The bidder willing to accept the lowest penalty wins the auction; the winner pays the back taxes to the County and receives the tax lien plus the right to collect the penalty. If the owner does not pay up, the lien holder can obtain a tax deed and thus become the parcel's owner.

State law sets the maximum penalty at 18%, see 35 ILCS 200/21-215, and the County's regulations set the minimum penalty at zero. Most parcels attract multiple bids at 0% penalty. The bidders expect to make their profits not by collecting surcharges from owners but from reselling (for more than the amount paid to the County in back taxes) the parcels of owners who do not pay. Vigorous competition among bidders has driven the winning penalty down to the floor, and from the County's perspective this is all to the good: it recovers the taxes, and owners need not pay extra. But multiple, identical bids pose a problem: who wins the auction? The County might allow negative bids (so the owner could redeem by paying less than the face amount of the tax), and then the market would clear, but the regulations forbid such bids—perhaps because a negative penalty would lead rational owners not to pay their taxes until after the liens had been sold.

The County's solution to the problem of multiple bids at 0% is allocation by lot. If X bids 0% on ten parcels, and each parcel attracts five bids at that penalty rate, then the County awards X two of the ten parcels. Winners share according to the ratio of their bids to other identical bids. This creates an incentive to submit multiple bids per parcel, either directly or through agents. If Y submits two bids per parcel, then its take from the auction will be double that of X. To prevent this, the County promulgated what it calls the "Single, Simultaneous Bidder Rule": each "tax buying entity" must submit bids in its own name, and no "related entity" may bid. A "related entity" is any other person or firm that either (a) has a shareholder, partner, principal, or officer in common with the "tax buying entity," or (b) has a "contractual relationship with" the "tax buying entity." Thus if Jones is a partner in Y, a bidder at the sale, any other business in which Jones has an ownership or management role is forbidden to participate; likewise Z can't participate if it has a contractual relation with Y (for example, if Z has agreed to sell to Y any of the tax liens that Z receives

at the auction). Before each auction, every potential bidder must furnish the County with an affidavit that no agent or other related entity will participate in that auction.

Phoenix Bond and BCS Services, two regular participants in Cook County's tax sales, contend that Sabre Group, LLC, and its principal Barrett Rochman regularly violate the Single, Simultaneous Bidder Rule by arranging for related firms to bid, and that as a result Sabre Group obtains an extra portion of profitable liens. If this is so, then Sabre Group's affidavit must be false; and if it is false, the Sabre Group knows that it is false and hence has committed fraud. Because the tax-sale process employs the mail—perhaps to send affidavits, and certainly to send notices to owners that the liens have been sold and the taxes must be paid or the property forfeited—any fraud that affects which bidders obtain how many liens is "mail fraud." See *Schmuck v. United States*, 489 U.S. 705 (1989). And because Sabre and its affiliates have engaged in a pattern of mail fraud, the argument goes, a private treble-damages remedy is available under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1964. The damages would be set by the value of the liens that would have gone to Phoenix Bond and BCS Services had Sabre Group and its affiliates complied with the Single, Simultaneous Bidder Rule.

This at any event is the theory that plaintiffs advance. They did not get very far, however. The district court dismissed the complaint under Fed. R. Civ. P. 12(b)(1) for lack of standing, and thus absence of federal jurisdiction. 2005 U.S. Dist. LEXIS 34912 (N.D. Ill. Dec. 21, 2005). The County is the proper plaintiff, the district court concluded.

Standing is not a problem in this suit. Plaintiffs suffer injury in fact, and that injury can be redressed by damages. Extra bids reduce plaintiffs' chance of winning any given auction, and loss of a (valuable) chance is real injury. So the Supreme Court held in *Northeastern Florida Chapter, Associ-*

ated General Contractors of America v. Jacksonville, 508 U.S. 656 (1993). Thousands of liens are sold at each auction. Plaintiffs suffer an actual (and substantial) reduction in the number of liens they take away. No more need be said about standing.

Injury in fact is not sufficient under RICO, however; the plaintiff also must establish that its injury was proximately caused by the defendants' scheme. See *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006); *Holmes v. SIPC*, 503 U.S. 258 (1992). The Court acknowledged in Holmes that "proximate causation," a term long used in tort law, poses a set of questions to ask; it is not a formula that may be applied algorithmically. 503 U.S. at 268-70. Is someone else a distinctly better enforcer? Does the presence of intermediate parties make it too hard to calculate damages—or create a risk that recovery by this plaintiff will come at the expense of someone with a better claim? If so, then suit by the remotely injured person should not be allowed.

In *Holmes*, for example, manipulation supposedly caused the price of shares in six firms to decline substantially; broker-dealers that had specialized in those firms' securities for their own accounts went bankrupt and were liquidated; when the broker-dealers failed, customers whose funds had been invested in other securities suffered because the broker-dealers could not keep promises to their customers (for example, could not pay in full for other securities that the customers had sold); the Securities Investor Protection Corp., which paid off the customers' claims against the broker-dealers, then sued the persons supposedly responsible for the manipulation that set off this chain of events. The Court held that the broker-dealers (or their trustees in bankruptcy) that had invested in the securities subject to the manipulation, and not persons who suffered derivative injury when the broker-dealers failed, were the right plaintiffs. SIPC was subrogated to the customers' claims, but the customers did not suffer

immediate injury and could not use RICO to recover ahead of the broker-dealers' other customers. See also *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333 (7th Cir. 1989) (favorably cited in *Holmes*, 503 U.S. at 274). Any money that the broker-dealers recovered could be used to satisfy all claims against them. Recovery by the SIPC would cut out the broker-dealers' other creditors.

In *Anza* the plaintiffs were business rivals of retailers that allegedly had cheated on their taxes. The theory of causation was that, by not paying sales taxes, defendants reduced their costs of doing business and thus could cut the retail price; consumers then bought less from the plaintiffs (and for less per unit, as plaintiffs had to compete with defendants' low prices). The entity directly injured by the fraud was the polity entitled to the taxes, and the Court thought that it would be too difficult to determine how much (if any) of the tax savings had been passed on to customers. Cf. *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Instead of trying to determine what had been passed on—and to apportion damages if the governmental bodies also sued—the Court thought it best to allocate the entire claim to the immediate victim.

Defendants maintain that Cook County is the victim of their fraud (supposing, as they must at the pleading stage, that they have committed fraud). Yet Cook County did not lose even a penny: each winning bidder always pays all back taxes and interest. The bidding at these auctions concerns how much the owners must pay in penalties, not how much the County receives. And as long as competition drives the bidding down to 0% penalty, property owners are indifferent to who acquires the tax lien. The *only* injured parties are the losing bidders, who acquire fewer tax liens than they would if the Single, Simultaneous Bidder Rule were followed.

To see this, suppose the FCC decides to award 500 radio licenses for $10,000 each by lottery and insists that each

person submit only one entry directly or through any related entity. If Jones arranges for friends, family, and a raft of newly formed corporations to submit 1,000 entries, honest entrants would be crowded out, while Jones could end up with multiple licenses. The honest entrants would be the only losers: the federal Treasury would still receive $10,000 per license, and the general population would be indifferent (presumably all winners would resell their licenses to whoever could make best use of the frequencies).

It is possible to imagine circumstances under which the County (or at least its taxpayers) would be a victim of cooperation among bidders. If all of the potential bidders get together and agree to raise the penalty to 10% or even 18%, that would constitute a monopsony cartel, and the taxpayers would be the worse for it. But defendants (understandably) do not contend that they have organized a cartel, a line of argument that would win this suit at the expense of establishing the Antitrust Division and the property owners as potential plaintiffs. For their part, plaintiffs do not allege that defendants have formed a cartel, for a cartel would be to their benefit. If defendants raised the penalty bid even to 1%, plaintiffs and anyone else outside the group could bid 0% and obtain all of the liens. Even a few non-cooperating bidders would spoil the cartel. On the allegations of plaintiffs' complaint there is no cartel, and therefore plaintiffs rather than the County or the property owners are the immediately injured parties.

Doubtless the County could enforce its own rule, even though it loses nothing financially from the submission of multiple bids by related bidders. But of course the complaint alleges that defendants are lying to the County, which makes enforcement difficult—defendants' affidavits assure the County that the Rule is being complied with. Anyway, the proposition "G can penalize fraud" differs from the proposition "G is the immediate victim of fraud." If a government's

ability to penalize fraud knocked out private litigation, then § 1964 would no longer apply when the predicate act is fraud, for governments always have some ability to detect and penalize frauds.

According to defendants, the suit should be dismissed even if plaintiffs are the immediate and principal (if not the only) losers. That's so, defendants say, for two reasons: first, no false statements were made to plaintiffs; the affidavits were filed with the County. Second, plaintiffs are not in the "zone of interests" protected by the statute making mail fraud a federal crime. These come to largely the same thing, and the argument is not sound whichever way it is put.

The mail fraud statute, 18 U.S.C. §1341, defines a fraudulent *scheme*, rather than a particular false statement, as the crime. It is illegal to obtain money by a scheme that entails fraud, if use of the mail is integral to the scheme. That's why it is unnecessary to show that the false statement was made to the victim. A scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's. So we held in both *In re EDC, Inc.*, 930 F.2d 1275, 1279-80 (7th Cir. 1991), and *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995), and we see no reason to change course. Three other circuits that have considered this question agree with our conclusion that the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements. See *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994); *Systems Management, Inc. v. Loiselle*, 303 F.3d 100, 103-04 (1st Cir. 2002); *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004), reversed on other grounds, *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). But see *Vandenbroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000) (plaintiffs must show that they "in fact relied upon [the

defendant's] material misrepresentation"); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360-61 (11th Cir. 2002) (same). The box score is thus four circuits on one side and two on the other; we shall adhere to the majority position. (Changing sides could not eliminate the conflict.)

Defendants say that Phoenix Bond and BCS Services are not in the zone of interests protected by the mail fraud statute because they weren't taken in by any false statement. That's just a different take on the proposition that only recipients of the untruth have a remedy. When we articulated a zone-of-interests approach in *EDC* and *Israel Travel*, it was to drive home the point that the injury must be direct rather than derivative. We said, for example, that "business rivals may not use RICO to complain about injuries derivatively caused by mail frauds perpetrated against customers" (61 F.3d at 1258) and that "victims of fraud are the object of solicitude; §1341 does not establish a regime of truth-telling without regard to details like who is losing out and why" (*ibid.*). We summed up: "firms suffering derivative injury from business torts . . . must continue to rely on the common law . . . rather than resorting to RICO" (*ibid.*). Because a zone-of-interests approach so closely overlaps the law as developed in *Holmes* and *Anza*, it serves no independent role. When the injury satisfies the requirements of *Holmes* and *Anza*, it cannot be knocked out by a zone-of-interests requirement that has no purchase in the text of either §1341 or RICO.

REVERSED AND REMANDED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 05 C 4095

PHOENIX BOND & INDEMNITY, CO.,
OAK PARK INVESTMENTS, INC., and BCS SERVICES, INC.,
Plaintiffs,

v.

JOHN BRIDGE, BARRETT ROCHMAN, SABRE GROUP LLC, ROBERT JENSEN, JOSEPH VARAN, CRONUS PROTJECTS, LLC, JEFFREY BRIDGE, REGAL ONE, LLC, CCJ INVESTMENTS, LLC, DRN II, INC., FRANCIS ALEXANDER, GEORGETOWN INVESTORS, LLC, JASON BAUMBACH, OPTIMUM FINANCIAL, INC., L.C.C. VENTURE, LLC, JESHAY, LLC, JESSE ROCHMAN, CHRISTOPHER ROCHMAN, CORINNE ROCHMAN, BRB INVESTMENTS, LLC, DOUGLAS NASH, MUD CATS REAL ESTATE, LLC, CARPUS INVESTMENTS, LLC, GREGORY ELLIS, GJ VENTURE, LLC

Defendants.

MEMORANDUM OPINION AND ORDER REGARDING DEFENDANTS' MOTIONS TO DISMISS

JAMES F. HOLDERMAN, *District Judge*:

On July 15, 2005, plaintiffs Phoenix Bond & Indemnity Company ("Phoenix"), Oak Park Investments, Inc. ("Oak Park"), and BCS Services, Inc. ("BCS") filed a complaint against several defendants[1] that compete against the plaintiffs

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[1] The complete list of defendant entities and their respective defendant principals or agents is as follows: (1) Sabre Group, LLC ("Sabre"), its

and other buyers at the annual Cook County tax lien sale. (Dkt. No. 1.) In the complaint, the plaintiffs raise claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962, 1964, and a state law claim of tortious interference with prospective business advantage. The defendants responded with motions to dismiss under Federal Rule of Civil Procedure 12(b). (Dkt. Nos. 61, 66, 68, 71, 74, 76.) For the reasons stated below, this court grants the defendants' motions to dismiss.

BACKGROUND

Taking all well-pleaded factual allegations in the complaint as true and drawing inferences therefrom in favor of the plaintiffs, *Hernandez v. City of Goshen*, 324 F.3d 535, 537 (7th Cir. 2003), this court summarizes the basis for plaintiffs' claims as follows. Each year the Cook County Treasurer's Office holds a tax sale on properties on which the owner, after having been given due notice, has failed to pay real estate taxes thereon. At the tax sale, the County offers to the public the opportunity to purchase the tax lien on these properties through an auction. In exchange for the tax lien on the property, the buyer pays the County the delinquent taxes owed. The purchase of the tax lien does not affect the property owner's legal or equitable title to the property; rather, the owner has the right to redeem the property by paying the delinquent taxes and any penalties assessed within a statuto-

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principal Barrett Rochman, and its registered tax bidder John Bridges; (2) Regal One, LLC and its principal Jeffrey Bridges; (3) DRN II, Jeshay, Mud Cats Real Estate, LLC, and their principal Douglas Nash; (4) Cronus Projects, LLC, its principal Robert Jensen, and its principal Joseph Varan; (5) CCJ Investments, LLC, BRB Investments, LLC, their principal Christopher Rochman, their principal Jesse Rochman, and their principal Corinne Rochman; (6) Georgetown Investors, LLC and its principal Francis Alexander; (7) Optimum Financial, Inc., Carpus Investments, LLC, and their principal Jason Baumbach; and (8) L.C.C. Venture, LLC, GJ Venture, LLC, and their principal Gregory Ellis.

rily established redemption period. If the owner does not pay the delinquent taxes and penalties within the redemption period, the tax buyer or the buyer's assignee may obtain a tax deed for the property and thereby buy the property for essentially the value of the delinquent taxes and any subsequent taxes. If the owner redeems the property within the statutory period, the buyer of the tax lien or the buyer's assignee has the right to receive the money paid to redeem the property including any penalties assessed. Once the tax buyer purchases the lien, the buyer may also pay any real estate taxes that become due after the purchase, and those subsequent taxes are subject to a statutory penalty of 12% should the owner wish to redeem the tax lien.

The buyers of the tax liens at the auctions determine the penalty rate assessed on the properties' tax debt by bidding on the penalty percentage rate that will be assigned to the property. Under County rules, the rate ranges between 0% and a maximum penalty of 18%. The winning bids is the lowest penalty rate. For properties where several bidders bid the lowest penalty rate of 0%, the Treasurer allocates those properties on a rotational basis to each of those bidders. If multiple simultaneous bids of the same percentage penalty are made, with no bid being the least, no bid will be accepted. These rules benefit the delinquent property owners by rewarding the bidder who is willing to allow the owner to redeem the property for the smallest penalty is allowed to buy the property. Since the 2000 auction, increasing competition at the auctions has resulted in a typical penalty rate of 0%.

Where the winning bid is 0% for the penalty percentage, there are three possible outcomes for the buyer. If the owner redeems the tax lien promptly, the buyer receives only the repayment of the delinquent taxes. If the subsequent taxes are paid by the buyer before the owner redeems the tax lien, the buyer will receive the delinquent taxes plus the statutory 12% penalty. Should the owner not redeem the property, the buyer

will have the opportunity to the obtain a tax deed and full ownership of the property after paying only the taxes on it. The value of the property at the auction depends on the bidders' assessment of these possible outcomes.

In order to complete the sale of the tax lien or to later petition for a deed to the property, a buyer must provide notice to the owner of the property in accordance with Illinois law. Within four months and 15 days of the purchase of the lien, buyers provide notice pursuant to 35 Ill. Comp. Stat. 200/22-5 ("22-5 notice") to the County that the County then mails to the owner. The buyer pays for the mailings to the owner. In addition, if the owner were not to redeem the property within the statutory period and the buyer wishes to petition for a deed, the buyer must file a petition five months before the end of the redemption period and provide notice of the petition pursuant to 35 Ill. Comp. Stat. 200/22-10 ("22-10 notice") to the owners, occupants, or other interested parties to the property. The County sheriff serves the 22-10 notice of the deed petition on the owners, occupants, or interested parties. Certified mail is used to send 22-10 notices to parties residing outside the state.

In the plaintiffs' complaint in this case, the claims center around one of the regulations that the Treasurer's Office has issued for bidding on tax liens: the "Single, Simultaneous Bidder Rule," which prohibits related bidding entities from simultaneously bidding on the same property at the auction, and requires that buyers affirm their compliance under penalty of perjury.[2] Under the Single, Simultaneous Bidder Rule,

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[2] The Single, Simultaneous Bidder Rule provides that "one tax buying entity (principal) may not have its/his/her/their actual or apparent agents, employees, or related entities, directly or indirectly register under multiple registrations for the intended or perceived purpose of having more than one person bidding at the tax sale at the same time for the intended or perceived purpose of increasing the principal's likelihood of obtaining a successful bid on a parcel."

a related bidding entity is "any individual, corporation, partnership, joint venture, limited liability company, business organization, or other entity that has a shareholder, partner, principal, officer, general partner, or other person or entity having an ownership interest in common with, or contractual relationship with, any other registrant" at the annual tax sale. A single bidder may represent several buyers, so long as the bidder is not acting on behalf of multiple buyers at the same time on the same property. The Treasurer or her designated representatives has sole or exclusive discretion to enforce the Single, Simultaneous Bidder Rule. (Dkt. No. 1, Ex. A at 7, "Acknowledgment of Single, Simultaneous Bidder Rule.")

According to the plaintiffs, the defendants violated the Single, Simultaneous Bidder Rule during the 2002, 2003, 2004, and 2005 Cook County tax sales by colluding to act together as related bidders and bidding on the same properties at the lowest penalty rate. The plaintiffs claim that by having more related bidders on each auction, the defendants can purchase from the Treasurer's rotational allocation a greater amount of those properties that receive multiple bids of the lowest percentage penalties.

The plaintiffs assert that the defendants' violation of the Single, Simultaneous Bidder Rule is part of a scheme to defraud the Treasurer and competing buyers of tax liens. According to the plaintiffs, the scheme is structured as follows. Each year before the tax sale, the defendant entities register with the Treasurer's office and sign sworn affidavits that they are not related bidding entities. But before the 2002 tax sale—the first year of the purported scheme—defendant Sabre agreed to act with the other defendant entities as related bidding entities and to have the entities transfer properties that they purchase at the tax sale to Sabre. Beginning in 2002, the plaintiff assert, Sabre directed the defendant entities Regal and DRN II to secretly bid on Sabre's behalf at the auction. During the next several years, more related entities were

added or renamed to allegedly bid on Sabre's behalf. The last defendant entities to join the alleged scheme in 2005 were BRB, GJ, Carpus, Mud Cats, whose principals had formerly used the defendant entities CCJ, L.C.C., Optimum, and Jeshay in previous years of the scheme.

Seeking to end this alleged scheme, the plaintiffs filed a lawsuit in this court, alleging substantive RICO violations with the predicate acts of mail fraud and a state claim. The defendants now move to dismiss the complaint, arguing among other issues that the plaintiffs lack standing to bring the RICO claims.

APPLICABLE LEGAL STANDARDS

Claims are subject to dismissal under Rule 12(b)(1) where this court does not have subject matter jurisdiction over the claim. Fed. R. Civ. P. 12(b)(1). For challenges under Rule 12(b)(1), the court may look beyond the complaint to other evidence submitted by the parties to determine whether subject matter jurisdiction exists. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 922, 946 (7th Cir. 2003).

In considering dismissal of a claim pursuant to Rule 12(b)(6), the court can only look to the complaint's allegations, and dismiss the complaint only when it appears beyond a doubt that the plaintiff can prove no set of facts that would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45 (1957). Unless a plaintiff is alleging fraud, a plaintiff need only plead "the bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer." Fed. R. Civ. P. 8; *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002). Allegations of fraud subject a complaint to heightened pleading standards under Federal Rules of Civil Procedure 9(b), which requires a plaintiff to plead averments of fraud with particularity. *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 726 (7th Cir. 1998). For purposes of particularity, a plaintiff must allege "the who, what, where, and

when of the alleged fraud." *Ackerman v. Nw. Mutual Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999); *see Slaney v. The Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 597 (7th Cir. 2001). Allegations of malice, intent, knowledge and other condition of mind, however, may be averred generally. Fed. R. Civ. P. 9(b); *United States v. N. Trust Co.*, 372 F.3d 886, 888 (7th Cir. 2004).

RICO, §§ 1962 and 1964

Briefly, RICO prohibits a "person" from conducting or participating in the conduct of an enterprise, which is engaged in activities affecting interstate or foreign commerce, through a pattern of racketeering activity or conspiracy to do the same. §§ 1964(c), (d); *see Sedima, S.P.R.L. v. Imrex Co.*, 473U.S. 479, 482-83 (1985). Racketeering activity is "any act 'chargeable' under several generically described state criminal laws, and any act 'indictable'" under statutorily specified federal criminal provisions, including mail fraud. *Sedima*, 473 U.S. at 483. Private plaintiffs injured in their "business or property by reason of a violation of § 1962" may bring a civil suit against the alleged violators for treble damages. *See* § 1962. To adequately plead a RICO violation under § 1962, plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *See Roger Whitmore's Automative Servs., Inc. v. Lake County, Ill.*, 424 F.3d 659, 670 (7th Cir. 2005). A pattern of racketeering activities consists of at least two predicate acts, such as mail fraud, committed within a ten year period. 18 U.S.C. § 1961(5). In addition, the RICO violation must be both the "but for" causation and the proximate cause for the injury to the plaintiffs' business or property. *See Holmes v. Securities Investor Protection Corp.*, 504 U.S. 258, 268 (1992); *Corley v. Rosewood Care Ctr., Inc., of Peoria*, 388 F.3d 990, 1005 (7th Cir. 2004).

In their complaint, the plaintiffs predicate their RICO claims on several acts of mail fraud. The conduct consists of

the defendants' alleged scheme to defraud the Treasurer and other buyers during each tax sale since 2002 by violating the Single, Simultaneous Bidder Rule in order procure more of the properties allocated on a rotational basis. According to the plaintiffs, the mailing of the 22-5 and 22-10 notices that are required by the County to complete the purchase of the tax liens on the properties constitute the use of the mail in furtherance of the defendants' scheme. In defining the enterprise engaged in this scheme to defraud, the plaintiffs use two different definitions, labeling the enterprise in one count an "association in fact" of the "Rigged Bidding Enterprise" and calling the enterprise "Sabre" in another count.

ANALYSIS

The various defendants each challenge the plaintiffs' RICO claims on many of the same grounds, and for the most part adopt each other's arguments. As a threshold matter, this court believes that proper analysis requires the court initially to address the defendants' contention that the plaintiffs lack standing to raise the RICO claims. Standing affects this court's subject matter jurisdiction to hear the case and therefore must be addressed first. *See DH2, Inc. v. S.E.C.*, 422 F.3d 591, 596 (7th Cir. 2005).

Defendants argue that a RICO claim with a predicate act of mail fraud protects only the recipients of the fraudulent representations or the mailings; however, business rivals, who may suffer an indirect injury, should their customers receive the misrepresentations or mailings, are outside the "zone of interests" that RICO protects. As applied to the circumstances of this case, the defendants contend that the alleged violation of the Single, Simultaneous Bidder Rule and the subsequent mailed notices directly affect only the Treasurer and the property owners whose tax liens were purchased by the defendants. In response, the plaintiffs assert that, for purposes of standing, it is sufficient that the plaintiffs were the intended victims of the scheme to defraud—as competing bidders who

lost out on a greater allocation of properties—even if they were not the primary victims. And, the plaintiffs continue, the responsibility for pursing a RICO claim against the defendants cannot rest with the primary victim, the Treasurer, because the Treasurer has suffered no loss of property or money from the defendants' scheme; the Treasurer still collects the delinquent taxes regardless of which buyer purchases the tax lien.

RICO incorporates the common-law principles of proximate causation from tort law. *Holmes*, 503 U. S. at 267-8. As in tort law, a plaintiff claiming a RICO injury by the defendant's violation of a statute "must show not only that the defendant violated the law but also that the plaintiff is among the persons protected by the law." *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257-58 (7th Cir. 1995); *see Honorable v. Easy Life Real Estate Sys., Inc.*, 182 F.R.D. 553, 562-63 (N.D. Ill. 1998) (customers have no standing in RICO case because bank fraud statute only meant to protect financial institutions). Competitors and business rivals may have standing to bring a RICO claim, even where an injury is indirect, so long as the relevant common law or statute protects the competitor or business rival and the injury satisfies the requirements of causation and foreseeability. *Israel Travel*, 61 F.3d at 1257-58 (producer injured by campaign misinformation directed at customers may suffer compensable injury under tort law, such as common law of unfair competition).

In this case, the contours of the mail fraud statute's "zone of interests" is a close question. Only the plaintiffs and other competing buyers, as opposed to the Treasurer or the property owners, would suffer a financial loss from a scheme to violate the Single, Simultaneous Bidder Rule. That the plaintiffs would suffer a loss, however, is not enough to establish standing. The plaintiffs must establish that they are the beneficiaries of the mail fraud statute's protection, and they cannot

do so. The plaintiffs were not the recipients of either the defendants' alleged misrepresentations that they were complying with the Single, Simultaneous Bidder Rule, nor were they sent the mailings that completed the purchase of the tax lien. The misrepresentations were made to the Treasurer and the mailings were sent to the property owners. This situation is distinguishable from the case, In the Matter of EDC, Inc., 930 F.2d 1275, 1279 (7th Cir. 1991), on which the plaintiffs rely for the holding that "[o]ne can be an intended victim without being the primary victim." The plaintiffs in *EDC*, although not the primary victims, were the intended victims as direct recipients of the misrepresentations. Therefore, the EDC plaintiffs were held to be beneficiaries of the mail fraud statute's protection. *Id.* at 1280.

The plaintiffs here were not recipients of the alleged misrepresentations and, at best were indirect victims of the alleged fraud. Although a close question, the court holds that the plaintiffs are not in the class of individuals protected by the mail fraud statute, and therefore are not within the "zone of interests" that the RICO statute protects. Consequently, the court holds that plaintiffs lack standing to bring the alleged RICO claims. *See Travel*, 61 F.3d at 1258; *Honorable*, 182 F.R.D. at 562-63. Because the allegations in the plaintiffs' complaint do not demonstrate plaintiffs' standing to bring their alleged RICO claims, this court dismisses those claims with prejudice and declines to extend supplemental jurisdiction to the remaining state law claim, which is dismissed without prejudice.

Having substantively resolved the RICO claims, this court need not address the other argument raised by the defendants that the plaintiffs did not adequately plead the RICO claims with particularity. That said, for the sake of judicial economy, this court briefly sets outs several pleading deficiencies that, perhaps, should be corrected if this court's decision dismissing the plaintiffs' RICO claims were to be appealed, reversed, and remanded.

In pleading allegations of fraud, the plaintiffs are required to plead averments of fraud with particularity, alleging "the who, what, where, and when of the alleged fraud." *Ackerman*, 172 F.3d at 469; *see Slaney*, 244 F.3d at 597. Allegations made "on information and belief" do not satisfy the particularity requirements of Rule 9(b) and must be disregarded unless the allegations are based on facts inaccessible to the plaintiff and the plaintiff pleaded the grounds for his suspicions. *See Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683-84 (7th Cir. 1992); *Interlease Aviation Investors II (Aloha) L.L. C. v. Vanguard Airlines, Inc.*, 254 F.Supp.2d 1028, 1040 (N.D. Ill. 2003). As the Supreme Court acknowledged in *Rotella v. Wood*, 528 U.S. 549, 560 (2000), Federal Rule of Civil Procedure 11(b)(3) grants some flexibility to Rule 9(b) particularity requirement, allowing pleadings "based on evidence reasonably anticipated after further investigation or discovery."

In the complaint, the plaintiffs couch many of their allegations as being made on "information and belief" when alleging key elements of the alleged scheme to defraud. This court recognizes that certain of these alleged facts may be based on evidence that the plaintiffs reasonably anticipate having access to only after further investigation or discovery, *see Rotella*, 528 U.S. at 560, but the plaintiffs also allege facts based on "information and belief" that, with proper diligence, they could locate in the public record. As an example, the plaintiffs use "information and belief" to allege the jurisdictional RICO element that defendants sent certain 22-10 mailings to out of state to property owners. (Cmplt. ¶¶ 95-103.) With due diligence, the plaintiffs should be able to locate the tax liens purchased by the defendants at the auction and the identities and locations of the owners of those properties. Failing to properly allege the jurisdictional element for the RICO claims is fatal.

Furthermore, the allegations supporting the defendants' scheme to defraud lack such specificity that an argument could be made that the allegations fail to allege any fraud at all. The plaintiffs do not identify any properties on which the defendants simultaneously bid; and on which the plaintiffs also bid and lost. If the defendants all participated in the tax sale as related entities but never simultaneously bid on a property, it appears they may not have lied under oath in their registration materials or violated the Treasurer's Single, Simultaneous Bidder Rule. The plaintiffs also assert on "information and belief" only that the other defendants transferred tax liens to defendant Sabre after the auctions. (Cmplt. ¶¶ 59, 61, 69, 70, 72, 73, 78, 80, 81, 82, 86, 88, 89.) Without a proper allegation that Sabre in fact received properties from the other defendants, there is no support for the plaintiffs' contention that Sabre colluded with the defendants to secure their properties. This court would expect that there would be a public record of assignments of tax liens to Sabre that the plaintiffs should be able to locate and allege. This court delves no further into this issue than to advise the plaintiffs of some of what the court perceives at this stage to be defects in the complaint's allegations that could be alleged better should this case return to this court for further proceedings.

CONCLUSION

This court concludes that the plaintiffs lack standing to bring their RICO claims and declines to exercise supplemental jurisdiction over the state law claim of tortious interference with business advantage. The defendants' motions to dismiss (Dkt. Nos. 61, 66, 68, 71, 74, 76) are granted. Counts I through IV are dismissed with prejudice and Count V is dismissed without prejudice. The case is dismissed. Judgment is entered in favor of the defendants and against the plaintiffs.

ENTER

/s/ James F. Holderman
JAMES F. HOLDERMAN
United States District Judge

DATE: December 21, 2005

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 06-1160

PHOENIX BOND & INDEMNITY CO. AND BCS SERVICES, INC.,
Plaintiffs-Appellants,

v.

JOHN BRIDGE, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 05 C 4095—James F. Holderman, *Chief Judge.*

April 17, 2007

Before

HON. FRANK H. EASTERBROOK, Chief Judge

HON. RICHARD A. POSNER, Circuit Judge

HON. TERENCE T. EVANS, Circuit Judge

Order

Defendants-appellees filed a petition for rehearing and rehearing en banc on March 5, 2007. No judge in regular active service has requested a vote on the petition for

rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Flaum and Judge Rovner did not participate in the consideration of this matter.

REPLY BRIEF

No. 07-210

FILED
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SUPREME COURT, U.S.

In the Supreme Court of the United States

SABRE GROUP, LLC, *et al.*,
Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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PARTIES TO THE PROCEEDINGS

Petitioners are Sabre Group, LLC; Barrett Rochman; and John Bridge. Other parties in the court of appeals were Plaintiffs-Appellants Phoenix Bond & Indemnity Co. and BCS Services, Inc. and Defendants-Appellees Robert Jensen; Joseph Varan; Jeffrey Bridge; Francis Alexander; Jesse Rochman; Douglas Nash; Cronus Projects, LLC; Gregory Ellis; GJ Venture, LLC; L.C.C. Venture, LLC; Regal One, LLC; Jason Baumbach; Optimum Financial, Inc.; Carpus Investments, LLC; DRN II, Inc.; Jeshay, LLC; Mud Cats Real Estate, LLC; Georgetown Investors, LLC; Corinne Rochman; Christopher Rochman; BRB Investments, LLC; and CCJ Investments, LLC.

The court of appeals dismissed Plaintiff-Appellant Oak Park Investments, Inc. as a party.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Sabre Group, LLC has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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In the Supreme Court of the United States

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SABRE GROUP, LLC, *et al.*,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

Respondents fail to address the fundamental legal arguments presented in Sabre Group's petition. Instead, they attempt to minimize the importance of an issue that the Court twice has agreed to review but has not yet resolved. Respondents also mischaracterize the conflict among the circuits on the issue presented, and they wrongly suggest that they can eliminate the issue at trial by showing general reliance on others' anticipated compliance with legal and regulatory requirements. None of respondents' arguments undermines the need for review.

1. Respondents wrongly attempt to create the impression that a civil RICO claim represents their only potential cause of action.

The question in this case is not whether respondents can assert any cause of action but only whether they properly can pursue a civil RICO claim. Respondents may well be able adequately to allege some common law tort. Indeed, in the district court they already have alleged a state law claim of tortious interference with prospective business advantage. App. 10a. The question before this Court, however, is whether a plaintiff must allege and prove reliance on an alleged misrepresentation by the defendant as a prerequisite for stating a civil RICO claim predicated on mail fraud. Here, respondents have not alleged such reliance nor could they. They received no representation from petitioners and thus could not have relied on any such representation. The mailings alleged in the supposed predicate acts of mail fraud (i) were not sent to respondents and (ii) did not involve any alleged misrepresentation. Without a requirement that respondents plead and prove reliance, civil RICO—and its provision for recovery of treble damages and attorneys' fees—will expand inappropriately to displace much state tort law.

2. A reliance requirement is an appropriate limitation of civil RICO claims.

As this Court has recognized previously, determining whether a plaintiff must show reliance on an alleged misrepresentation in civil RICO cases where the predicate acts are based on fraud is a "substantial question." *Anza v. Ideal Steel Supply Corp.*, ___ U.S.

___, 126 S. Ct. 1991, 1998 (2006). This Court granted *certiorari* in *Bank of China v. NBM L.L.C.*, 545 U.S. 1138 (2005) (No. 03-1559), to address that very issue. The question presented in that case was whether a civil RICO plaintiff must establish reasonable reliance to recover under § 1964(c). The petition in that case was dismissed pursuant to this Court's Rule 46. *Bank of China v. NBM L.L.C.*, 546 U.S. 1026 (2005) (No. 03-1559). Reliance also was at issue in *Anza v. Ideal Steel Supply Corp.*, but this Court held that plaintiffs could not establish proximate cause, and the Court therefore did not reach the reliance issue. 126 S. Ct. at 1998.

A requirement that a civil RICO plaintiff show reliance on a fraudulent misrepresentation will ensure that only appropriate claims are brought under the statute. Respondents assert that "proximate cause is the statutory touchstone in civil RICO cases" (Opp. 11), as if proximate cause is the only relevant issue. But the language of § 1964(c) does not mention proximate cause. Instead, this Court interpreted the statutory phrase "by reason of" to encompass the concept of proximate cause, which "label[ed] generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Proximate cause is a limiting factor, employed to restrict the types of claims that may be legitimately raised under the broad language of § 1964(c). Similarly, a requirement of reliance is an appropriate limitation for civil RICO claims predicated on mail or wire fraud, because it will ensure that "some direct relation between the injury asserted and the injurious conduct alleged" exists before permitting a plaintiff to recover. *Id.* Reliance is more than a mere "milepost"

for a plaintiff bringing a civil RICO claim predicated on fraud. Opp. 20. Like proximate cause, reliance is a longstanding requirement of common law fraud that should be applied to civil RICO plaintiffs to prevent the over-federalization of fraud claims, including claims that would not survive in state court.

3. There is a conflict among the circuits on the question of reliance, and the issue is ripe for review.

Respondents claim there is no ripe conflict at issue because "every circuit to consider the issue but possibly the Sixth has ruled . . . that a showing of proximate cause may be made where a RICO plaintiff is a direct *victim* or *target*, but not necessarily the *recipient*, of acts of mail or wire fraud by defendants." Opp. 11-12. Respondents are incorrect; a proper analysis of the relevant cases shows a sharp conflict among the circuits that cannot be resolved by any one court of appeals acting alone.

In *Chisolm v. TranSouth Financial Corp.*, 95 F.3d 331, 337 (4th Cir. 1996), the Fourth Circuit explicitly stated that "where fraud is alleged as a proximate cause of the injury, the fraud must be a 'classic' one. In other words, the [civil RICO] plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation." Respondents ignore this case and instead, point to the same court's earlier decision in *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994), to support their contention that the Fourth Circuit would conclude that this case presents an appropriate civil RICO claim.

In *Mid Atlantic*, the plaintiffs alleged that a competitor's fraudulent mailings to customers resulted in the competitor stealing away the plaintiff's customers because the customers relied on the fraudulent information. *Id.* at 261. Twelve years later in *Anza*, however, this Court held that plaintiffs who also claimed they suffered injury because a third party relied on a competitor's allegedly fraudulent statements did not meet the proximate cause requirement of *Holmes*. 126 S. Ct. at 1998. Accordingly, it is doubtful the plaintiff in *Mid Atlantic* would have survived the required proximate cause analysis announced in *Anza*.

The Fourth Circuit's ruling in *Chisolm*, decided after *Mid Atlantic*, is a better source for determining that circuit's position on the issue of reliance. The Fourth Circuit's ruling that a civil RICO plaintiff "must have justifiably relied, to his detriment, on the defendant's material misrepresentation," 95 F.3d at 337, is directly at odds with the decision by the Seventh Circuit below. Contrary to respondents' revisionist history, the Seventh Circuit in this case explicitly recognized the existence of a circuit conflict that no one circuit could eliminate. App. 7a. Review by this Court is needed to resolve the conflict.

4. The allegedly "narrow" exception raised by respondents is unsupported by the common law and is an unworkable limitation on civil RICO claims.

Respondents claim that the Fourth and Fifth Circuits both recognize an exception to the general requirement that a civil RICO plaintiff must have relied upon the alleged fraudulent conduct. Opp. 14-15. Respondents rely upon two cases, one from

each circuit, to support this argument. Respondents contend that they establish an allegedly narrow "target exception" to the rule that civil RICO plaintiffs must establish reliance on the alleged fraud. Opp. 15 (quoting *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 564 (5th Cir. 2001)). In the Fourth Circuit, respondents point to the *Mid Atlantic* case as support for their argument that this case falls within this supposed exception. As explained previously, however, *Mid Atlantic* cannot survive the proximate cause analysis in *Anza* and should not be considered good law. More important, the alleged exception cannot be sustained as a valid interpretation of the "by reason of" requirement of § 1964(c). None of the cases cited by respondents explains the statutory derivation of the alleged exception. That is not surprising. The language of § 1964(c) does not reflect any such exception.

Furthermore, unlike proximate cause and reliance, the target exception is not rooted in the well-developed common law on fraud. This Court already has recognized the value of turning to common law concepts when interpreting civil RICO. *See, e.g.*, *Beck v. Prupis*, 529 U.S. 494 (2000) (applying common law principles of civil conspiracy to reject plaintiff's civil RICO claim); *Holmes*, 503 U.S. 258 (1992) (interpreting the "by reason of" language to require proximate cause and specifically referring to the same requirement at common law). The reliance requirement follows this Court's previous application of the common law to establish the appropriate boundaries of civil RICO claims, whereas the alleged target exception is rooted in no such tradition. At most, the cases cited by respondents demonstrate that the law is in conflict not only among the circuits,

but also within some circuits. Resolution can be achieved only by review in this Court.

5. Respondents' inability to plead and prove reliance will not be cured by further factual development.

Respondents claim for the first time in their opposition that upon further factual development, they may be able to demonstrate their reliance on "the integrity of the allocation process used by the County," which assertedly would satisfy any reliance requirement under civil RICO. Opp. 29. This alleged general reliance on others' compliance with the law is not reliance on a misrepresentation, as required for a claim predicated on fraud. Respondents neither received nor relied on any misrepresentations. Their belated effort in this Court to hypothesize some "reliance" on something attributable to petitioners is too little too late.

Respondents cite *Living Designs, Inc. v. E.I. DuPont de Nemours and Co.*, 431 F.3d 353 (9th Cir. 2005), but that case does not support their position. The Ninth Circuit there did not hold that reliance on another party's compliance with "statutes, court orders, court rules, rules of evidence, written agreements, representations to the court by officers of the court, and representations made under oath" can establish reliance for a civil RICO claim predicated on fraud. *Id.* at 363. Rather, the Ninth Circuit explicitly declined to make any such ruling. *Id.* The court also observed that any such ruling would be premature, pending this Court's review in *Bank of China v. NBM L.L.C.*, 545 U.S. 1138 (2005) (No. 03-1559). *Id.* at 363 n.8. The Ninth Circuit determined only that it was improper for the district court to

grant judgment on the pleadings where the district court assumed that the plaintiffs were required to prove reasonable reliance, and the plaintiffs had "adequately pleaded reasonable reliance in their amended complaint." *Id.*

Here, of course, respondents pleaded no reliance at all, either on any alleged fraudulent misrepresentations by petitioners or on petitioners' allegedly anticipated general compliance with the law. In any event, permitting a plaintiff to proceed under civil RICO by claiming to have relied on an expectation that the defendant generally would comply with the law would eviscerate any reliance requirement. Any plaintiff could make such an allegation, and such an allegation would not ensure that civil RICO claims could proceed only where there is a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268.

6. Because respondents did not receive *any* representations from petitioners, by mail or otherwise, allegedly fraudulent or otherwise, this case squarely presents the reliance issue.

It is undisputed in this case that respondents did not receive any fraudulent representations from petitioners or anyone else. It is undisputed that no mailings containing any fraudulent representations were sent to anyone. It is undisputed that respondents did not receive any mailings whatsoever from petitioners, much less any mailings containing fraudulent representations. Respondents, having not received any fraudulent representations, could not possibly have relied on any such representations.

This case therefore presents the reliance issue in a clear-cut way that will not be affected by factual disputes.

In asserting their civil RICO claim based on an alleged pattern of mail fraud violations, respondents have identified only one kind of allegedly relevant mailing, namely, post-auction mailings required by the Illinois Property Tax Code to advise property owners that their properties had been sold due to nonpayment of taxes. Respondents do not allege that any of these mailings contained false statements. Respondents assert only that these mailings were an indispensable part of petitioners' alleged fraudulent scheme to acquire more than their fair share of tax liens during the annual tax sales because the liens had little value except as precursors to obtaining deeds, and deeds could not be obtained without causing the requisite notices to be mailed.

This Court has not yet decided whether, in a civil RICO case based on allegations of mail fraud, plaintiffs should be permitted to rely on such innocent, remote mailings to the same extent as if they were prosecutors in a criminal action. Nor is it at all clear whether the mailings alleged in this case are more like the mailings held sufficient in *Schmuck v. United States*, 489 U.S. 705 (1989), or more like the mailings held insufficient in *Kann v. United States*, 323 U.S. 88 (1944), *Parr v. United States*, 363 U.S. 370 (1960), and *United States v. Maze*, 414 U.S. 395 (1974), all of which the 5-4 majority in *Schmuck* distinguished. For present purposes, however, it is not necessary to address either of these questions. The critical point is that, given the remoteness of the mailings and the lack of any fraudulent representation to respondents in any form, no reliance requirement for a civil RICO

claim based on fraud could be satisfied in this case. This case thus provides an excellent vehicle through which to resolve the reliance issue that has eluded decision on the two prior occasions when the Court decided to review it.

There is a fundamental difference between a criminal prosecution for mail fraud and a § 1964(c) *civil* action based on the same underlying violation. In a criminal action, the prosecutor only needs to show a "scheme to defraud"—not a "completed fraud," with resulting injury. *Neder v. United States*, 527 U.S. 1, 25 (1999). By contrast, under § 1964(c), a civil plaintiff seeking monetary recovery "'faces an additional hurdle' and must show an injury caused 'by reason of' the violation." *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 559 (5th Cir. 2000) (quoting *Pelletier v. Zweifel*, 921 F.2d 1465, 1498-99 (11th Cir. 1999)). Therefore, to preserve the distinction between criminal and civil cases, a "completed fraud" in the civil RICO context must mean something more than a garden-variety scheme—it must be a fraudulent scheme in which the civil RICO plaintiff has relied on a fraudulent representation and has been injured as a result. This case does not satisfy that requirement.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

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December 6, 2007

AMICUS CURIAE BRIEF

(3)

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In The

Supreme Court of the United States

JOHN BRIDGE, *et al.*,

Petitioners

v.

PHOENIX BOND & INDEMNITY CO., *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF MCKESSON CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a plaintiff asserting a civil RICO claim predicated on acts of mail fraud must plead and prove that it relied on the alleged misrepresentations by the defendant to its detriment.

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BRIEF OF McKESSON CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

McKesson Corporation respectfully submits this brief as *amicus curiae* in support of the petition for a writ of *certiorari*.[1]

INTEREST OF THE *AMICUS CURIAE*

McKesson Corporation is the nation's leading health care and information technology company, and is the largest pharmaceutical distributor in North America. McKesson is responsible for the distribution of one-third of the medicines used in North America, and supplies more than 25,000 U.S. healthcare locations, ranging from Wal-Mart to the Department of Veterans Affairs to community pharmacies. McKesson employs 30,000 people, and is among the Global Fortune 500.

McKesson, and numerous other businesses in its industry, recognize the importance of the Racketeer Influenced and Corrupt Organizations Act (RICO) to deter and remedy actual wrongdoing prohibited by the statute, but also understand that deterrence requires consistent and disciplined application of the law.

The application of RICO has suffered from misuse against businesses and other organizations because of the statute's treble damages provision. The court of appeals' holding in this case, that a plaintiff alleging injury "by reason of" a defendant's misrepresentation need *not* allege reliance on that misrepresentation, obviates an important check against abuse and unnecessarily expands the scope of liability under the statute, particularly in the context of

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae* or their counsel made such a monetary contribution to the preparation or submission of this brief.

class actions, where the threat of treble damages on a class-wide basis often leads to unwarranted settlements, irrespective of the merits of the underlying claims.

This unnecessary expansion of civil RICO has led to costly litigation and the potential for billions of dollars of liability, particularly in the context of class actions, where class certification often terminates cases, even where defendants have meritorious defenses, because the looming litigation costs and possible consequences compel the defendant to settle. Businesses within McKesson's industry have been the targets of these actions, and have learned that the inconsistent approach taken by the courts on the question presented by this case has led to the certification of massive nationwide classes in some jurisdictions and the denial of certification in others. Plaintiffs are also aware of this anomaly, so that forums with less stringent civil RICO standards are becoming havens for these suits. Accordingly, McKesson has a substantial interest in encouraging this Court to review and reverse the decision below.

SUMMARY OF ARGUMENT

A. The question in this case concerns the provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) that permit a party alleging mail or wire fraud to raise a civil RICO claim based on a pattern of racketeering activity predicated on such fraud and to recover treble damages. 18 U.S.C. § 1964(c). Specifically, RICO makes it unlawful, under Section 1962(c), for a person employed or associated with an enterprise to conduct the enterprise's affairs through a pattern of racketeering activity. Racketeering activity is defined by RICO to include acts that can be charged under the federal mail and wire fraud statutes. *Id.* § 1961(1)(B). In order to bring a civil action under RICO to recover treble damages, costs, and attorneys' fees, a person must have been "injured in his business or property *by reason of a* violation of section 1962." *Id.* § 1964(c) (emphasis added).

The courts of appeals are divided on whether a plaintiff alleging a violation of mail or wire fraud in a RICO civil action must plead and prove that he relied on the alleged fraud or misrepresentation. Five courts of appeals have held (correctly in our view) that a plaintiff must allege he detrimentally relied on the fraud; two courts of appeals (including the court below) have held that it is enough that the complaint allege that *someone*, even if not the plaintiff, relied on the fraud; and one court of appeal, in *dicta*, has expressed the view that no reliance at all is required.

This question warrants resolution by this Court to ensure evenhanded application of RICO across the country. Indeed, the Court has twice granted *certiorari* in separate attempts to resolve the issue, but was unable to reach the question in either case. This case is an ideal vehicle in which to resolve the circuit conflict.

B. Class action litigation throughout the country is particularly susceptible to abusive suits under RICO, and, in light of this conflict, the outcome of such litigation is becoming increasingly dependent on the choice of jurisdiction. Civil RICO has become a favorite tool of plaintiffs filing class actions—cases that often settle upon certification or disappear upon the denial of it.

Because certification requires that common issues of law or fact predominate over individual ones, courts that have obviated the requirement that plaintiffs have actually relied upon the fraud—an individualized inquiry—to satisfy Section 1964(c)'s "by reason of" requirement have become a haven for civil RICO class actions. These cases are proliferating against some of the most important industries in the national economy, and almost always involve aggregated claims for staggering sums (all of which would be trebled). This intolerable result subjects defendants to significant forum shopping where out-of-state corporations are hailed into distant courts in nationwide class actions, and which party wins often depends upon where the action is filed.

C. Requiring that a plaintiff plead and prove detrimental reliance is consistent with Section 1964(c)'s "by reason of" requirement and this Court's prior proximate cause precedent. This Court held that Congress intended to incorporate common law in its "by reason of" requirement, and under the common law, civil fraud requires that a plaintiff must have been misled to his detriment.

ARGUMENT

REVIEW IS NECESSARY TO RESOLVE AN ENTRENCHED CIRCUIT SPLIT ON WHETHER A PLAINTIFF IN A CIVIL RICO ACTION PREDICATED ON MAIL OR WIRE FRAUD CAN SOMEHOW MEET RICO'S "BY REASON OF" REQUIREMENT WITHOUT PROOF THAT HE RELIED ON THE FRAUD TO HIS DETRIMENT

A. This Case Presents An Issue Already Recognized To Warrant Review And Is An Appropriate Vehicle For Resolution Of The Issue

There can be no doubt that the petition presents a question worthy of this Court's plenary review because the Court previously granted review on the question, but did not ultimately decide it. The disagreement in the lower courts continues unabated and this case is an appropriate vehicle for resolution of the question.

1. This Court has twice granted *certiorari* on the precise issue presented, but has not yet resolved it

Twice in the past three years this Court has attempted to resolve the conflict between the federal courts of appeals as to whether, or to what extent, a plaintiff must prove that he detrimentally relied upon alleged mail or wire fraud in order to meet the "by reason of" requirement to maintain a civil RICO action predicated on such fraud.

In *Bank of China, New York Branch v. NBM L.L.C.*, the Court granted review in a case arising from the Second Circuit. *See* 545 U.S. 1138 (2005) (granting *certiorari* to review 359 F.3d 171 (2d Cir. 2004)). Although the petition in *Bank of China* presented two questions for review, the Court limited *certiorari* to a single question of its own creation that is virtually identical to the one at issue in the instant case. The Court's question asked whether the court of appeals erred "when it held that civil RICO plaintiffs alleging mail and wire fraud as predicate acts must establish 'reasonable reliance' under 18 U.S.C. § 1964(c)?" *Ibid.* The Court did not decide the question, however, because after briefing, but prior to oral argument, the case was dismissed pursuant to this Court's Rule 46. *See* 546 U.S. 1026 (2005).

Thirteen days later, this Court granted *certiorari* in *Anza v. Ideal Steel Supply Corp.*, *see* 546 U.S. 1029 (2005), which again presented essentially the same question, *i.e.*, "Whether a competitor is 'injured in his business or property by reason of a violation'" of RICO "where the alleged predicate acts of racketeering activity were mail fraud but the competitor was not the party defrauded and did not rely on the alleged fraudulent behavior." Pet. for *Cert.*, at i, *Anza v. Ideal Steel Supply Corp.*, No. 04-433 (filed Sept. 29, 2004).

But *Anza* proved to be an inadequate vehicle to resolve that question presented. The plaintiffs and defendant were competing businesses and, according to the plaintiffs, the defendant had cheated on its taxes and submitted false statements to the State of New York regarding certain taxes it was not collecting, which gave it a competitive advantage over the plaintiffs (*i.e.*, the ability to charge its customers less). The court of appeals had reasoned that, even though the plaintiffs had not relied on the alleged false statements by defendants in their tax documents, it was enough that *someone* relied upon those misstatements (*i.e.*, the State). *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004) ("This Court has not held that the civil-RICO plaintiff who alleges mail fraud or wire fraud must have been the entity that relied on the

fraud."). These facts, however, raised a proximate cause issue that the Court could not overlook.

This Court held in *Anza* that "[t]he direct victim of this conduct was the State of New York, not [the plaintiffs]. It was the State that was being defrauded and the State that lost tax revenue as a result." *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1997 (2006). The Court further explained, with respect to the plaintiffs' claim, that, "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Id.* at 1998. The Court found that the alleged fraud did *not* lead directly to the plaintiff's injuries. *Ibid.* As such, the plaintiffs' "injury was not the direct result of a RICO violation" and proximate cause was lacking. *Ibid.*

Because the case was resolved on the absence of proximate cause, this Court had "no occasion to address the substantial question whether a showing of reliance is required." *Ibid.*

2. This case does not suffer from the proximate cause defect in *Anza v. Ideal Steel Supply Corp.*

The *certiorari* petition in the instant case provides the first meaningful opportunity for this Court to decide this oft-granted but still unresolved question. Indeed, the decision below is an ideal vehicle because, after applying *Anza*, the court of appeals ruled that proximate cause existed even though the plaintiff did not rely upon petitioner's alleged misrepresentation. As such, the decision below provides this Court with the opportunity to address not only the question of *whether* reliance is required at all but, if it is, also the question of *what* degree of reliance is necessary.

The instant case involves the auction of property where there was a tax lien (for unpaid property taxes). The county sells such liens at auction, where there is a fierce competition to buy the liens. The winner is determined by whoever bids to impose the lowest

surcharge on the owner (which ranges between 0 and 18%). The purchasers of the tax liens expect to make their profits from reselling the property of owners who do not pay (for more than the value of the lien), and do not expect to make their profit by charging surcharges from the owners. Thus, most parcels attract a bid of 0% surcharge.

Because there are often multiple 0% bids, the county awards the liens in accordance with the following allocation system: "If X bids 0% on ten parcels, and each parcel attracts five bids at that penalty rate, then the County awards X two of the ten parcels." Pet. App. 2a. This system encourages a bidder to submit multiple bids, including through agents, but the county prohibits such agent bidding and requires that, "[b]efore each auction, every potential bidder must furnish the County with an affidavit that no agent or other related entity will participate in that auction." *Id.* at 3a.

According to plaintiffs (respondents, here), petitioners submitted false affidavits and in fact bid multiple times on single properties, in violation of county law. The county, of course, was not injured by these multiple submissions because it got paid in full irrespective of who won or what the bid was. Respondents, however, claim injury because they, as competing bidders, received less than their pro rata share of properties. For example, if X bids five times on each of 10 parcels (instead of bidding a single time on ten parcels as the law allows), and each parcel attracts 10 bids, X would be awarded 5 of the 10 parcels.

The Seventh Circuit ruled that these facts satisfy the proximate cause requirement of *Anza* because the direct victims of petitioners' alleged fraud were the respondents themselves. Pet. App. 5a (noting that the county "did not lose even a penny" and that "[t]he *only* injured parties are the losing bidders, who acquire fewer tax liens than they would" absent the fraud). Having determined there was proximate cause, something this Court in *Anza* could not do, the court of appeals then rejected petitioner's argument that respondents, as plaintiffs, had to prove that the false statements were made to them and that they

relied on them. Pet. App. 7a. The Seventh Circuit disagreed because, in that court's view, "the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements." *Ibid.*

3. The division amongst the courts of appeals is widespread and entrenched

The decision below highlights the irreconcilable nature of the division amongst the courts of appeals on the question presented. The Seventh Circuit, in deciding that reliance by a third party is sufficient to satisfy a plaintiff's need to prove injury "by reason of" a defendant's civil RICO fraud conduct, stated that three other courts of appeals agree with its conclusion, Pet. App. 7a, and that two courts of appeals disagree because they require that plaintiffs actually rely upon the misrepresentation, *id.* at 7a-8a. Because the division is so deep, the court of appeals specifically determined that it made no sense for it to attempt to minimize the disagreement because "[c]hanging sides could not eliminate the conflict." *Id.* at 8a.

The court of appeals is correct that the circuit conflict cannot be resolved by the courts of appeals changing sides on their own (indeed, the Seventh Circuit denied petitioners' petition for rehearing *en banc*, *see* Pet. App. 23a). Moreover, we submit that the division among the circuits is even deeper than described by the court below.

A clear majority (five) of the federal courts of appeals that have addressed the question have held, correctly in our view, that civil RICO's requirement that a plaintiff have been "injured in his business or property *by reason of* a violation of section 1962," 18 U.S.C. § 1964(c) (emphasis added), means that a plaintiff alleging mail or wire fraud as the RICO violation must prove that he relied on the fraud to his detriment. *See, e.g.*, *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996) (civil RICO plaintiffs must "allege both that they detrimentally relied in some way on the fraudulent mailing and that the

mailing was a proximate cause of the alleged injury to their business or property") (internal citation omitted);[2] *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001) (each member of putative RICO class action "must then prove reliance upon * * * alleged fraud"); *VanDenBroeck v. CommonPoint Mortg. Co.*, 210 F.3d 696, 701 (6th Cir. 2000) (alleged misrepresentation must have been "calculated or intended to deceive persons of reasonable prudence and comprehension, and must also show that plaintiffs in fact relied upon that material misrepresentation"); *Appletree Square I, Ltd. P'ship v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994) ("In order to establish injury to business or property 'by reason of' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts."); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360 (11th Cir.) ("when a plaintiff brings a civil RICO case predicated upon mail or wire fraud, he must prove that he was a target of the scheme to defraud and that he relied to his detriment on misrepresentations made in furtherance of that scheme") (internal quotations omitted), *cert. denied*, 537 U.S. 884 (2002).

Two other circuits have held, however, that the "by reason of" requirement of Section 1964(c) can be satisfied

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[2] Citing to *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994), the Seventh Circuit stated that the Fourth Circuit permits the reliance requirement to be satisfied by a third party. That is not so. The Fourth Circuit's *subsequent* decision in *Chisolm* makes clear that direct reliance by a plaintiff is required by that court (a rule that was in place both *before* and *after* the anomalous *Mid Atlantic Telecom* decision). Moreover, *Mid Atlantic Telecom* is no longer good law because that fact pattern (unlike the one in the instant case) clearly could not survive application of *Anza*. In *Mid Atlantic Telecom*, a competitor sued a rival company on the ground that the rival had defrauded customers (by claiming to offer lower prices for telephone services when it was in fact not offering them) which took customers away from its competitors. Just as in *Anza*, however, there can be no proximate cause because the customers were the direct victims of the fraud and the plaintiff competitor's injuries were highly speculative. *Anza*, 126 S. Ct. at 1998.

in a civil RICO action predicated upon mail or wire fraud so long as the plaintiff shows that any third party, no matter who, relied on the alleged misrepresentation. In addition to the court below, Pet. App. 7a-8a, the Second Circuit has long required only third-party reliance. *See Ideal Steel Supply Corp. v. Anza*, 373 F.3d at 262-263 (reciting Second Circuit's long line of precedents requiring that only a third party rely upon the fraud), *rev'd on other grounds*, 126 S. Ct. 1991 (2006).

The First Circuit, standing alone, has explained, in *dicta* no less, that no reliance at all need be shown. *See Systems Mgmt., Inc. v. Loiselle*, 303 F.3d 100 (1st Cir. 2002).[3] The First Circuit stated that "[t]here is no good reason * * * to depart from RICO's literal language by importing a reliance requirement into RICO." *Id.* at 104.

Finally, district courts throughout the country have concluded (either relying on a broad reading of *Systems Management* or on their own accord) that no reliance is required in civil RICO actions. Although further division in the district courts ordinarily does not support this Court's discretionary review, it should for the instant issue.

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[3] Although the First Circuit in *Systems Management* found that reliance by the plaintiffs was not required, it reversed the judgment for the plaintiffs on other grounds. 303 F.3d at 104-106. Its analysis of the reliance issue was, therefore, *dicta*. As discussed below, courts applying *Systems Management* have read the First Circuit's exposition as providing that no reliance is needed and the First Circuit has not revisited the issue.

Systems Management could, in fact, be read as requiring third-party reliance because there the plaintiffs were underpaid employees suing their employer who had misrepresented its compliance with minimum wage law to the college with which it had a contract. Thus, the college was defrauded and could satisfy a third-party standard. 303 F.3d at 104. Even giving *Systems Management* such a reading does not eliminate, however, the division amongst the courts of appeals (it becomes five-to-three rather than five-to-two-to-one).

B. The Circuit Split Adversely Affects Class Action Rulings In The District Courts, Which Often Evade Appellate Review

This intolerable circuit conflict on RICO has led to confusion, forum shopping, and anomalous results in some of the most significant corporate cases before the federal courts.

1. Civil RICO is a favorite plaintiff claim in complex, multi-billion dollar class actions

The split among the circuits on the showing required for a civil RICO action predicated on mail and wire fraud creates divergent results in high-stakes, multiparty litigation that affects almost every American business and often evades appellate review. Numerous Fortune 500 companies, including the instant *amicus*, have become targets of plaintiffs who transform any fraud allegation into a civil RICO action because of the unusual relief of treble damages and attorneys' fees. Although businesses often prevail on the merits against individual fraud claims, or even those brought by a small group of plaintiffs, the stakes change significantly when plaintiffs attempt to certify a class under Rule 23 of the Federal Rules of Civil Procedure.

The threat of class-wide damages, particularly when they would be trebled under 18 U.S.C. § 1964(c), often forces legitimate businesses to forgo the possibility of defending the claim rather than face potentially staggering liability, substantial litigation expenses, and the attendant risk of being associated with a federal law claim of "racketeering." This Court has recognized that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Indeed, the empirical evidence demonstrates that class actions that are certified almost always settle. *See* Thomas E. Willging & Shannon R. Wheatman, *An Empirical Examination of Attorneys'*

Choice of Forum in Class Action Litigation 48 (Federal Judicial Center 2005) ("It is often said that most or even all class actions settle. Data from the current study as well as the earlier [1996] FJC study reveal an important qualification for this statement: Almost all *certified* class actions settle.") (emphasis in original).

Rule 23(f) of the Federal Rules of Civil Procedure provides a possible avenue to interlocutory review of class certification, but courts of appeals do not grant these requests with any regularity, even though they universally recognize that certification "places 'insurmountable pressure' on a defendant to settle, even where the defendant has a good chance of succeeding on the merits." *Regents of Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 379 (5th Cir. 2007), *pet. for cert. filed*, No. 06-1341 (Apr. 5, 2007). Courts of appeal have imposed stringent standards on Rule 23(f) petitions, so that economic pressure and the fact that the decision might otherwise evade review are but some of many components in the decisionmaking process. *See, e.g.*, *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000) (focusing on criteria other than the fact that defendant may succumb to settlement demands); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999) (same). Indeed, courts of appeals have admonished that they "intend to exercise [their] discretion judiciously" because appellate review of certification orders "are disruptive, time-consuming, and expensive." *Mowbray*, 208 F.3d at 294.[4]

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[4] Businesses also are often compelled to settle large multidistrict litigation (MDL) actions when thousands of cases are transferred to a single judge pursuant to 28 U.S.C. § 1407. That one judge determines all pre-trial rulings and a single adverse ruling (with no chance for review) often can be dispositive in a MDL; indeed, MDLs almost always settle prior to being transferred back for trial to the court where they originated.

2. Class certification is easier to obtain in civil RICO fraud cases filed in district courts that do not require a showing of reliance

The question of whether and to what degree a plaintiff must demonstrate reliance on a defendant's alleged fraud in order to support a civil RICO fraud action is a particularly important question in class actions. Class actions certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure require "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." In light of that requirement, a class is almost never certified when plaintiffs must prove detrimental reliance. *See Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344 (11th Cir. 2006) ("In a variety of contexts, we have held that the reliance element of a class claim presents problems of individualized proof that preclude class certification."); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 435 (4th Cir. 2003) ("the reliance element of * * * fraud and negligent misrepresentation claims is not readily susceptible to class-wide proof") (citation omitted).

This is particularly the case in fraud-based civil RICO actions because courts have explicitly held that the need for class members to individually prove their own reliance on the underlying fraud effectively precludes the certification of a civil RICO class. *See Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 220 (5th Cir.) ("A [RICO] class cannot be certified when evidence of individual reliance will be necessary."), *cert. denied*, 540 U.S. 819 (2003); *Patterson*, 241 F.3d at 419 (the individualized reliance findings required in a civil RICO action precluded certification); *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000) ("the individual findings of reliance necessary to establish RICO liability and damages preclude not only (b)(2) certification of this class under RICO, but (b)(3) certification as well."); *Sikes*, 281 F.3d at 1364 (because RICO class members needed to demonstrate reliance, "[i]ndividual issues will therefore predominate over common issues.").

A number of major class actions (many of them nationwide) alleging violations of civil RICO based upon mail and wire fraud have been certified, however, because plaintiffs have brought their actions in circuits where a plaintiff is not required to rely upon the misrepresentation, such as in the First, Second, and Seventh Circuits. For example, the Seventh Circuit, where district courts are bound by that court's rule reaffirmed in the decision below, has become a haven for some of these large suits. *See, e.g.*, *In re Synthroid Mkt. Litig.*, 188 F.R.D. 295 (N.D. Ill. 1999) (certifying nationwide civil RICO class action without analyzing question of reliance). And, even in the few circuits where courts of appeals have not yet decided on which side of the legal divide they fall, district courts have certified civil RICO class actions without any showing of reliance. *See, e.g.*, *Grider v. Keystone Health Plan Central, Inc.*, No. 2001-CV-05641, 2006 U.S. Dist. LEXIS 93085, at *63-*64 (E.D. Pa. Dec. 21, 2006). When faced with such class actions, these courts are more likely to certify the class because, by disregarding the reliance issue, they do not need to analyze with any significant detail whether a class action is truly the superior method of adjudicating the dispute—namely whether Rule 23(b)(3)'s predominance and superiority requirements are met. And, as discussed above, class certification is almost always case dispositive, even though there might be meritorious defenses.

These class actions are a burden on the national economy. They have been filed, for example, against some of the nation's most important sectors, such as against health care companies like *amicus curiae*, health maintenance organizations, financial services companies, and ordinary businesses, all in cases where there was no showing of reliance. *See, e.g.*, *Grider*, 2006 U.S. Dist. LEXIS 93085 (class of thousands of doctors against health maintenance organization); *In re Synthroid Mkt. Litig.*, 188 F.R.D. at 295 (nationwide class certified against pharmaceutical industry); *Johnson v. Aronson Furniture Co.*, No. 96 C 117, 1998 U.S. Dist. LEXIS 14454 (N.D. Ill. Sept. 10, 1998) (class of all retail customers); *Peterson v. H&R Block Tax Servs., Inc.*, 174 F.R.D. 78 (N.D. Ill. 1997)

(statewide class against tax preparer); *Leff v. Olympic Fed. Sav. & Loan Ass'n*, No. 86c3026, 1987 WL 12921 (N.D. Ill. June 19, 1987) (statewide class certified against lender).

Absent review by this Court, these costly and complex class actions will continue to proliferate and will yield the intolerable result that class certification depends, in significant part, not on the merits of the underlying case but on where it is filed. Plaintiffs in nationwide class actions can engage in forum shopping by filing in circuits (such as the Seventh Circuit) that have relaxed the requirements for civil RICO and have thus diminished the requirements of Rule 23(b)(3). This is especially disconcerting because of the high stakes involved—often billions of dollars—and the absence of meaningful judicial review due to the coercive effect of certification.

C. The Ruling Below Is Contrary To This Court's Civil RICO Jurisprudence, Which Dictates That A Plaintiff Demonstrate That He Relied On The Defendant's Fraud To His Detriment To Meet RICO's "By Reason Of" Requirement

This Court's well-established precedent demonstrates that detrimental reliance must be a necessary component of proximate cause in a civil RICO cause of action like this one.

In *Holmes v. Security Investor Protection Corp.*, 503 U.S. 258 (1992), this Court construed the phrase "by reason of" in RICO to require that a plaintiff prove proximate cause rather than mere "but for" causation. The Court did so by relying upon the common law, and the fact that Congress intended to incorporate the common law in the "by reason of" requirement. Accordingly, this Court explained that, "among the many shapes this concept [of proximate cause] took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268 (citation omitted).

The elements of federal mail and wire fraud, of course, are also derived from the common law. *Holmes*, 503 U.S. at 267-268. And under the common law, civil fraud requires that a plaintiff "must have been misled to his prejudice or

injury." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 203, at 227 (13th ed. 1886). The fact that the government, in a *criminal* prosecution for mail and wire fraud, is relieved of such proof is of no moment, because it does not need to satisfy the *civil* standard of Section 1964(c). *Cf. United States v. Rowe*, 56 F.2d 747, 749 (2d. Cir.) (L. Hand, J.) ("Civilly of course the action would fail without proof of damage, but that has no application to criminal liability."), *cert. denied*, 286 U.S. 554 (1932). Section 1964(c) plainly requires more in civil actions for treble damages, *viz.*, an injury "by reason of" the enterprise's racketeering activity. *Anza*, 126 S. Ct. at 1995-1998; *Holmes*, 503 U.S. at 266-268.

A reliance requirement helps to effectuate the proximate cause limitations imposed by this Court in *Holmes* and again in *Anza*.

CONCLUSION

For the foregoing reasons and those set forth in the petition for a writ of *certiorari*, the petition should be granted.

Respectfully submitted,

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JOINT APPENDIX

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No. 07-210

In the Supreme Court of the United States

JOHN BRIDGE, *et al.*,
Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX
Volume I of II

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The following opinions, decisions, and orders have been omitted in printing this joint appendix because they appear in the appendix to the Petition for a Writ of Certiorari:

Opinion of the United States District Court for the Northern District of Illinois, dated December 21, 2005 .. Pet. App. 9a

Opinion of the United States Court of Appeals for the Seventh Circuit, dated February 20, 2007 ..... Pet. App. 1a

Order of the United States Court of Appeals for the Seventh Circuit, denying petition for rehearing en banc, entered on April 17, 2007 ..... Pet. App. 22a

UNITED STATES DISTRICT COURT

Civil Docket for Case #: 1:05-cv-04095

PHOENIX BOND & INDEMNITY CO., *et al.*,
Defendants,

v.

JOHN BRIDGE, *et al.*,
Plaintiff,

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
07/15/2005	COMPLAINT filed by BCS Services, Inc., Phoenix Bond & Indemnity Co. and Oak Park Investments, Inc.; (Exhibits); Jury Demand.(mjc,) (Entered: 07/18/2005)
09/22/2005	MOTION by Defendants Jeffrey Bridge, Regal One, LLC, Jason Baumbach, Optimum Financial, Inc., Carpus Investments, LLC to dismiss *and Memorandum of Law* (Rosenblum, Elisha) (Entered: 09/22/2005)
09/22/2005	MOTION by Defendants Robert Jensen, Joseph Varan, Cronus Projects, LLC, L.C.C. Venture, LLC, Gregory Ellis, GJ Venture, LLC to dismiss *Plaintiffs' Complaint.* (Clancy, Kevin) (Entered: 09/22/2005)

DATE	PROCEEDINGS
09/22/2005	MOTION by Defendants John Bridge, Barrett Rochman, Sabre Group LLC to dismiss *Plaintiffs' Complaint* (Becker, Theodore) (Entered: 09/22/2005)
09/22/2005	MOTION by Defendants DRN II, Inc., Jeshay, LLC, Douglas Nash, Mud Cats Real Estate, LLC to dismiss (Rosenbloom, David) (Entered: 09/22/2005)
09/22/2005	MOTION by Defendants CCJ Investments, LLC, Christopher Rochman, Corinne Rochman, BRB Investments, LLC to dismiss (gma,) (Entered: 09/22/2005)
09/22/2005	MOTION by Defendants Francis Alexander and Georgetown Investors, LLC to dismiss plaintiffs' complaint. (td,) (Entered: 09/23/2005)
11/10/2005	RESPONSE *Plaintiffs' Response to the Motion to Dismiss Filed by Defendants Douglas Nash, DRN II, Inc., Jeshay, LLC, and Mud Cats Real Estate, LLC* (Kistler, Lisa) (Entered: 11/10/2005)
11/10/2005	RESPONSE *Plaintiffs' Response to the Motion to Dismiss Filed by Defendants John Bridge, Barrett Rochman, and Sabre Group LLC* (Kistler, Lisa) (Entered: 11/10/2005)
11/10/2005	RESPONSE *Plaintiffs' Response to the Motion to Dismiss Filed by Defendants Georgetown Investors, LLC and Frances Alexander* (Kistler, Lisa) (Entered: 11/10/2005)

DATE	PROCEEDINGS
11/10/2005	RESPONSE *Plaintiffs' Response to the Motion to Dismiss Filed by Defendants Jeffrey Bridge, Jason Baumbach, Regal One, LLC, Optimum Financial, Inc. and Carpus Investments, LLC* (Kistler, Lisa) (Entered: 11/10/2005)
11/10/2005	RESPONSE *Plaintiffs' Response to the Motion to Dismiss Filed by Defendants CCJ Investments, LLC, BRB Investments, LLC, Jesse Rochman, Christopher Rochman and Corrine Rochman* (Kistler, Lisa) (Entered: 11/10/2005)
11/10/2005	RESPONSE *Plaintiffs' Response to the Motion to Dismiss Filed by Defendants Cronus Projects, LLC, Robert Jensen, Joseph Varan, Gregory Ellis, L.L.C. Venture, LLC, and GJ Venture, LLC* (Kistler, Lisa) (Entered: 11/10/2005)
12/21/2005	MINUTE entry before Judge James F. Holderman : The defendants' motions to dismiss (Dkt. Nos. 61, [62,] 68, 71, 74, 76) are granted. Counts I through IV are dismissed with prejudice. The court declies to exercise supplemental jurisdiction over the State claim in Count V, which is dismissed without prejudice. The case is dismissed for the reason stated in the attached memorandum opinion. This is a final order. Civil case terminated. Mailed notice (eav,) (Entered: 12/22/2005)

DATE	PROCEEDINGS
12/21/2005	MEMORANDUM Opinion and Order regarding defendants' motions to dismiss Signed by Judge James F. Holderman on 12/21/2005:Mailed notice(eav,) (Entered: 12/22/2005)
01/13/2006	NOTICE of appeal by BCS Services, Inc., Phoenix Bond & Indemnity Co., Oak Park Investments, Inc. regarding orders 128, 126, 127 ; Filing fee $ 255.00 paid; Receipt number 10331803 (dj,) (Entered: 01/17/2006)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Docket #: 06-1160

JOHN BRIDGE, *et al.*,
Appellee,

v.

PHOENIX BOND & INDEMNITY CO., *et al.*,
Appellant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/17/06	Private civil case docketed. [06-1160] [1944229-1] Transcript information sheet due 1/27/06. Appellant's brief due 2/27/06 for Phoenix Bond, for Oak Park Invest Inc, for BCS Services Inc. Docketing Statement due 1/20/06. (jame)
8/8/06	Filed 15c appellant's brief by Phoenix Bond, BCS Services Inc. Disk filed. [06-1160] [0-0] (trot)
10/6/06	Filed 15c appellee's brief by John Bridge, Barrett Rochman, Sabre Group, LLC. Disk filed. [06-1160] [0-0] (trot)
10/6/06	Filed 15c appellee's brief by Robert Jensen, Joseph Varan. Disk filed. [06-1160] [0-0] (scze)

DATE	PROCEEDINGS
10/6/06	Filed 15c appellee's brief by Douglas Nash, Mud Cats Real Estate, LLC, DRN II, LLC and Jeshay, LLC. Disk filed. [06-1160] [0-0] (andb)
10/10/06	ORDER re: Defendants CCJ's Investment, LLC, BRB Investments, LLC, Jesse Rochman, Christopher Rochman, and Corinne Rochman's motion to adopt co-defendants/ appellees' brief, filed on 10/6/06. The motion is GRANTED. Appellees CCJ Investments, LLC, and BRB Investments, LLC, Jesse Rochman, Christopher Rochman, and Corinne Rochman may adopt the brief of appellees John Bridge, Barrett Rochman, and Sabre Group, LLC, filed on 10/6/06, A copy of this order shall be distributed to the assigned merits panel. [2033742-1] CMD [06-1160] (fern)
10/17/06	ORDER re: Defendants-appellees, Georgetown Investors, LLC and Frances Alexander's renewed motion to join and adopt the brief of co-appellees Robert Jensen, Joseph Varan, Cronus Projects, LLC Gregory Ellis, GJ Venture, LLCc, and L.L.C. Venture, LLC and the brief of co-appellees John Bridge Barrett Rochman and Sabre Group LLC, filed on 10/13/06. The motion is GRANTED. Appellees Georgetown Investors, LLC and Frances Alexander may adopt the brief of the appellees Robert Jensen, Joseph Varan, Cronus Projects, LLC, Gregory Ellis, GJ Venture, LLC, and L.L.C. Venture, LLC

DATE	PROCEEDINGS
	filed on 10/6/06. A copy of this order will be distributed to the assigned merits panel. [2035905-1] CMD [06-1160] (fern)
10/17/06	ORDER re: Defendants-appellees, Jeffrey Bridge, Jason Baumbach, Regal One, LLC, Optimum Financial, Inc., and Carpus Investments, LLC's amended motion to join and adopt co-appellees' response briefs, filed on 10/13/06. The motion is GRANTED. Appellees Jeffreym Bridge, Jason Baumbach, Regal One, LLC Optimum Financial, Inc., and Carpus Investments, LLC may adopt the brief of appellees Robert Jensen, Joseph Varan, Cronus Projects, LLC Gregory Ellis, GJ Venture, LLC and L.L.C. Venture, LLC filed on 10/6/06, and the brief of appellees John Bridge, Barrett Rochman, and Sabre Group, LLC, filed on 10/6/06. A copy of this order will be distributed to the assigned merits panel. [2035929-1] CMD [06-1160] (fern)
11/3/06	Filed 15c appellant's reply brief by Phoenix Bond, BCS Services Inc. Disk filed. [06-1160] [0-0] (scze)
2/20/07	Filed opinion of the court by Chief Judge Easterbrook. REVERSED and REMANDED. Chief Judge Frank H. Easterbrook, Circuit Judge Richard A. Posner, Circuit Judge Terence T. Evans. [06-1160] [1944229-1] (amyd)

DATE	PROCEEDINGS
3/5/07	Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellee John Bridge, Appellee Barrett Rochman, Appellee Sabre Group, LLC. Dist. [06-1160] [2081198-1] (amyd)
3/9/07	ORDER re: 1) Defendants-Appellees, Jeffrey Bridge, Jason Baumbach, Regal One, LLC, Optimum Financial, Inc., and Carpus Investments, LLC's, Motion to Join and Adopt Co-Appellees Petition for Rehearing En Banc. 2) Motion to Join in the Petition of Appellees John Bridge, Barrett Rochman and Sabre Group, LLC for Rehearing En Banc. The motions are GRANTED. Appellees Jeffrey Bridge, Jason Baumbach, Regal Once, LLC, Optimum Financial, Inc., Carpus Investments, LLC, Georgetown Investors, LLC and Francis Alexander are granted leave to adopt appellees John Bridge, Barrett Rochman and Sabre Group, LLC's Petition for Rehearing. [2081617-1] [2081623-1] GMM [06-1160] (amyd)
3/14/07	ORDER issued GRANTING Motion to Join in Petition of Appellees John Bridge, Barrett Rochman and Sabre Group, LLC for Rehearing En Banc. Appellees Robert Jensen, Joseph Varan, Cronus Projects, LLC, Gregory Ellis, GJ Venture, LLC and L.C.C. Venture, LLC are granted leave to adopt appellees John Bridge, Barrett Rochman and Sabre Group, LLC's Petition for Rehearing. [2083417-1] GMM [06-1160] (amyd)

DATE	PROCEEDINGS
4/17/07	ORDER: Appellee John Bridge, Appellee Barrett Rochman, Appellee Sabre Group, LLC, Appellee Robert Jensen, Appellee Joseph Varan, Appellee Jeffrey Bridge, Appellee Francis Alexander, Appellee Jesse Rochman, Appellee Douglas Nash Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. *Judge Flaum and Judge Rovner did not participate in the consideration of this matter. [06-1160] [2081198-1] (amyd)
4/24/07	ORDER re: Motion of defendants John Bridge, Barrett Rochman and Sabre Group, LLC to stay mandate pending petition for writ of certiorari, filed on 4/23/07. The motion is DENIED. [2096588-1] GMM [06-1160] (fern)
1/11/08	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 07-210. [06-1160] [2177551-1] (mank)

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed July 15, 2005]

No. 05C 4095

PHOENIX BOND & INDEMNITY, CO., OAK PARK INVESTMENTS, INC., BCS SERVICES, INC.,
Plaintiffs,

v.

JOHN BRIDGE, BARRETT ROCHMAN, SABRE GROUP LLC, ROBERT JENSEN, JOSEPH VARAN, CRONUS PROJECTS, LLC, JEFFREY BRIDGE, REGAL ONE, LLC, CCJ INVESTMENTS, LLC, DRN II, INC., FRANCIS ALEXANDER, GEORGETOWN INVESTORS, LLC, JASON BAUMBACH, OPTIMUM FINANCIAL, INC., L.C.C. VENTURE, LLC, JESHAY, LLC, JESSE ROCHMAN, CHRISTOPHER ROCHMAN, CORINNE ROCHMAN, BRB INVESTMENTS, LLC, DOUGLAS NASH, MUD CATS REAL ESTATE, LLC, CARPUS INVESTMENTS, LLC, GREGORY ELLIS, GJ VENTURE, LLC
Defendants.

COMPLAINT AND DEMAND FOR JURY

Plaintiffs Phoenix Indemnity & Bond Co. ("Phoenix"), Oak Park Investments, Inc. ("Oak Park"), and BCS Services, Inc. ("BCS") (collectively, "Plaintiffs"), by and through their attorneys, Sachnoff & Weaver, Ltd., complaining against defendants John Bridge, Barrett Rochman ("B. Rochman"), Sabre Group, LLC ("Sabre"), Jeffrey Bridge, Regal One, LLC ("Regal"),

Robert Jensen ("Jensen"), Joseph Varan ("Varan"), Cronus Projects, LLC ("Cronus"), Jesse Rochman ("J. Rochman"), Christopher Rochman, Corinne Rochman, CCJ Investments, LLC ("CCJ"), Douglas Nash ("Nash"), DRN II, Inc. ("DRN II"), Francis Alexander ("Alexander"), Georgetown Investors, LLC ("Georgetown"), Jason Baumbach ("Baumbach"), Optimum Financial, Inc. ("Optimum"), Gregory Ellis ("Ellis"), L.C.C. Venture, LLC ("L.C.C."), Jeshay, LLC ("Jeshay"), BRB Investments LLC ("BRB"), Mud Cats Real Estate LLC ("Mud Cats"), Carpus Investments ("Carpus"), and GJ Venture LLC, ("GJ") (collectively "Defendants"), allege as follows:

Nature of the Action

1. Three tax buyers—Phoenix, Oak Park and BCS—bring this action against individuals and corporate entities that conspired to violate and violated the Cook County Single Simultaneous Bidder Rule (the "Rule" or the "County Rule") in the 2002, 2003, 2004 and 2005 tax sales, thereby damaging the Plaintiffs, as well as other tax buyer participants in those auctions. John Bridge, B. Rochman, and Sabre (the "Sabre Defendants") directed and controlled secret agreements with CCJ, DRN II, Georgetown, Regal, Optimum, L.C.C., Jeshay, Cronus, BRB, Mud Cats, Carpus and GJ, and their respective principals, to do Sabre's bidding—literally. Through a series of fraudulent schemes and collusive bidding, the Defendants unlawfully obtained the opportunity to purchase a greater number of the liens available for bid at the auctions through the conspiracy, thus reducing the number of liens Plaintiffs were able to purchase and costing Plaintiffs the financial benefits flowing from those purchases. Phoenix, Oak Park and BCS seek to enjoin the Defendants and to recover damages Plain-

tiffs suffered as a result of these schemes under sections 1962(c) and 1962(d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and tortious interference with prospective business advantage.

Jurisdiction and Venue

2. This Court has jurisdiction over federal law claims under 28 U.S.C. § 1331 and 18 U.S.C. § 1965(a). This Court has pendant jurisdiction over the state law claims of tortious interference with prospective business advantage arising out of these transactions.

3. Venue is proper in the Northern District of Illinois pursuant to 28 U.S.C. § 1391 and 18 U.S.C. § 1965 because the Defendants reside in, are found in, have an agent in, and/or transact their affairs in, the Northern District of Illinois where a substantial part of the events complained of occurred.

Parties

4. Plaintiff Phoenix Bond & Indemnity Co. is an Illinois corporation. Its business includes buying tax liens and acquiring deeds to properties for which real estate taxes were unpaid, and it participated in the 2002, 2003, 2004 and 2005 Cook County tax sales.

5. Plaintiff Oak Park Investments, Inc. is an Illinois corporation. Its business includes buying tax liens and acquiring deeds to properties for which real estate taxes were unpaid, and it participated in the 2002, 2003, 2004 and 2005 Cook County tax sales.

6. Plaintiff BCS Services, Inc. is an Illinois corporation. Its business includes buying tax liens and acquiring deeds to properties for which real estate taxes were unpaid, and it participated in the 2002, 2003, 2004 and 2005 Cook County tax sales.

7. Defendant John Bridge is an Illinois resident. He was a registered tax bidder of Sabre Group, LLC in the 2004 tax sale.

8. Defendant Barrett Rochman is an Illinois resident. B. Rochman is a principal of Sabre Group, LLC.

9. Defendant Sabre Group, LLC is an Illinois limited liability company. Its business includes buying tax liens and acquiring deeds to properties for which real estate taxes were unpaid, and it participated in the 2002, 2003 and 2004 Cook County tax sales. Its principal is Defendant Barrett Rochman.

10. Defendant Regal One, LLC is an Illinois limited liability corporation. Its business includes buying tax liens, and it participated in the 2002, 2003, 2004 and 2005 Cook County tax sales. Its principal is Defendant Jeffrey Bridge.

11. Defendant Jeffrey Bridge is an Illinois resident. Jeffrey Bridge is a principal of Regal One and was its registered tax bidder at the 2004 and 2005 tax sales. Jeffrey Bridge and John Bridge are brothers.

12. Defendant DRN II, Inc. is an Illinois limited liability company. Its business includes buying tax liens, and it participated in the 2002 and 2003 Cook County tax sale. Its principal is Defendant Douglas Nash.

13. Defendant Cronus Projects, LLC is an Illinois limited liability company. Its business includes buying tax liens, and it participated in the 2003, 2004 and 2005 Cook County tax sales. Its principals are Defendants Robert Jensen and Joseph Varan.

14. Defendant Robert Jensen is an Illinois resident. He is a principal of Cronus and was a registered bidder for Cronus in the 2004 and 2005 tax sales.

15. Defendant Joseph Varan is an Illinois resident. He is a principal of Cronus and was a registered bidder for Cronus at the 2004 tax sale.

16. Defendant CCJ Investments, LLC is an Illinois limited liability company. Its business includes buying tax liens, and it participated in the 2003 and 2004 Cook County tax sales. Its principals are Defendants Christopher Rochman, Jesse Rochman and Corinne Rochman.

17. Defendant Georgetown Investors, LLC is an Illinois limited liability company. Its business includes buying tax liens, and it participated in the 2004 and 2005 Cook County tax sales. Its principal is Defendant Francis Alexander.

18. Defendant Francis Alexander is an Illinois resident. He is a principal of Georgetown.

19. Defendant Optimum Financial, Inc. is an Illinois corporation. Its business includes buying tax liens, and it participated in the 2004 Cook County tax sale. Its principal is Defendant Jason Baumbach.

20. Defendant L.C.C. Venture, LLC, is an Illinois limited liability company. Its business includes buying tax liens, and it participated in the 2004 Cook County tax sale. One of its principals is Defendant Gregory Ellis.

21. Defendant Jeshay, LLC is an Illinois limited liability company. Its business includes buying tax liens, and it participated in the 2004 Cook County tax sale. Its principal is Defendant Douglas Nash.

22. Defendant BRB Investments, LLC is an Illinois limited liability company. Its business includes buying tax liens, and it participated in the 2005 Cook County tax sale. Its principals are Defendants Jesse Rochman, Corinne Rochman and Christopher Rochman.

23. Defendant Jesse Rochman is an Illinois resident. He is a principal for BRB Investments, LLC and was a registered bidder for BRB at the 2005 tax sale. He was a principal for CCJ Investments and was a registered bidder for CCJ at the 2004 tax sale. On information and belief, Jesse Rochman is Barrett Rochman's son.

24. Defendant Christopher Rochman is an Illinois resident. He is a principal for BRB Investments, LLC. He was a principal for CCJ Investments and was one of its registered bidders at the 2004 auction. On information and belief, Christopher Rochman is Barrett Rochman's son.

25. Defendant Corinne Rochman (a/k/a Corie Rochman) is a Florida resident. Corinne Rochman is a principal for BRB Investments, LLC, and was a principal for CCJ Investments. On information and belief, Corinne Rochman is related to Barrett Rochman.

26. Defendant Mud Cats Real Estate, LLC is an Illinois limited liability company. Its business includes buying tax liens, and it participated in the 2005 Cook County tax sale. Its principal is Defendant Douglas Nash.

27. Defendant Douglas Nash is an Illinois resident. He is a principal of Mud Cats and was one of its registered bidders at the 2005 tax sale. He was a principal for DRN II. He was also a principal of

Jeshay and was Jeshay's registered bidder at the 2004 tax sale.

28. Defendant Carpus Investments, LLC is an Illinois limited liability company. Its business includes buying tax liens, and it participated in the 2005 Cook County tax sale. Its principal is Defendant Jason Baumbach.

29. Defendant Jason Baumbach is an Illinois resident. He is a principal of Carpus and was its registered bidder at the 2005 tax sale. He was a principal for Optimum and was one of Optimum's registered bidders at the 2004 tax sale.

30. Defendant GJ Venture, LLC is an Illinois limited liability company. Its business includes buying tax liens, and it participated in the 2005 Cook County tax sale. Its principal is Defendant Gregory Ellis.

31. Defendant Gregory Ellis is an Illinois resident. He is currently a principal of GJ and L.C.C. He was GJ's registered bidder at the 2005 tax sale and was one of L.C.C.'s registered bidders at the 2004 tax sale.

Factual Background To All Counts

32. The annual Cook County tax sale is part of the Illinois property tax system run by the Cook County Treasurer's Office. If a property owner fails to pay his property taxes due in a given year, the Cook County Treasurer offers for sale to the public a tax lien on that property. The purchaser of the tax lien, the "Tax Buyer," pays the delinquent tax. The property owner may redeem that lien by paying the delinquent tax plus a determined penalty. Upon redemption, the Tax Buyer surrenders the lien and receives the tax amount plus the determined penalty. If the property

owner does not redeem the lien within two to three years, the Tax Buyer may commence a judicial proceeding by filing a Petition for Tax Deed and obtain title to the property.

33. The annual tax sale process begins when the Cook Country Treasurer publishes a list of delinquent real estate parcels in area newspapers. The notice outlines when the Treasurer will apply to the Circuit Court for judgment to begin a tax sale on the property and also lists the time, date and location of the proposed sale. At the tax sale, the County auctions the rights to the tax liens on the delinquent properties in exchange for the County's receipt of the delinquent taxes. The Treasurer then applies to the Circuit Court for judgment to begin the sale. After ruling on any objections, the court orders the sale to commence on the date that the Treasurer previously published or within five business days of that date.

34. Tax Buyers attend the auction to purchase tax liens. Each lien represents a different parcel of real estate for which taxes are delinquent.

35. Tax Buyers must be registered and qualified to bid at the tax sale. Registration requires the submission of an application and sworn affidavit in compliance with rules established by the Cook County Treasurer. Registration requires the submission of an application and sworn affidavit in compliance with rules established by the Cook County Treasurer.

36. Bids are not made in cash amounts and taxes are not sold to the highest bidder. The bidding process is designed to ensure that taxpayers/owners will be able to redeem their taxes at the lowest possible penalty rate. When a taxpayer redeems his taxes from a tax buyer, he pays the amount of taxes

paid by the tax buyer at the sale, plus penalty. At the annual tax sale, the tax buyers bid on the rate of penalty. The tax buyer who bids the lowest rate of penalty will win the bid. If more than one tax buyer bids at the same lowest rate, the auctioneer will allocate the liens on a rotational basis to ensure that there is a fair apportionment of liens among the lowest bidding tax buyers. The highest permissible penalty rate is 18% of the delinquent tax per penalty period. Since approximately 2000, the typical penalty rate has been 0%.

37. A few months after each annual tax sale, the County issues a Certificate of Purchase evidencing the tax lien sold on each parcel of real estate. The County issues Certificates of Purchase to and in the name of the Tax Buyer who made the successful bid. These documents are negotiable instruments that may be transferred.

38. Tax Buyer's profit by receiving the determined penalty or by obtaining title to property. In addition, once a Tax Buyer purchases a tax lien, the Tax Buyer can pay any real estate taxes that become due after the purchase, known as subsequent taxes. The penalty rate on subsequent taxes is set by statute, not by auction, at 12%. When a property owner redeems the tax lien, they must pay not only the original amount of the delinquent tax plus the determined penalty, but must also pay the subsequent taxes plus the statutory penalty rate of 12%. Tax Buyers profit by receiving this additional penalty amount from the payment of subsequent taxes.

39. Where the bid is 0%, the tax buyer has no possibility of making a profit from the penalty on the delinquent taxes underlying the lien. Profit may only be obtained by obtaining a deed or by paying subsequent

taxes and receiving the statutory penalty amount of 12%. If the tax buyer can obtain the deed for the property, the deed can be sold at a significant profit over the amount paid for the lien.

40. As a matter of law, no more than four months and fifteen days after purchase of a lien, the tax buyer who owns the certificate of purchase must draft a notice pursuant to 35 ILCS 200/22-5 (the "22-5 notice"), alerting the last assessee that the lien has been sold for delinquent taxes. The tax buyer provides the 22-5 notice to the County for the County to mail to the last assessee. The tax buyer retains a file-stamped copy of the same. The certificate holder pays the County for the mailing. The 22-5 notice is a mandatory condition to obtain a tax deed. The failure to file the 22-5 notice renders the tax certificate incapable of foreclosure through a petition for tax deed, leaving the Tax Buyer with no ability to secure a redemption of the tax lien, to recover its money or to obtain a deed.

41. In addition, if the property remains unredeemed after two to three years from the date of purchase, a lien holder may file a petition for deed. These petitions must be filed five months before the end of the period of redemption. Pursuant to 35 ILCS 200/22-10, in the first sixty days of the five-month period, the lien holder is required to provide notice to property owners, occupants and other interested parties (the "22-10 notice"). Pursuant to 35 ILCS 200/22-15, the Cook County Sheriff serves the lien holders' 22-10 notice of the deed petition and the impending expiration of the period of redemption on property owners, occupants and other interested parties in person. If any owners or interested parties cannot be served in person within Cook County, Illinois, the

sheriff will serve them by certified mail. Certified mail will be used to send the 22-10 notices to all parties outside of Illinois. The lien holder cannot obtain a deed without proper service of the 22-10 notice.

42. Further, during the first sixty days of that five-month period before the period of redemption expires, the tax buyer prepares a notice pursuant to 35 ILCS 200/22-25 (the "22-25 notice") and delivers that notice with the requisite fee for mailing to the Circuit Court of Cook County with direction to mail it to the relevant property owners and occupants alerting them that the lien holder has filed a petition for tax deed and the date upon which the period of redemption will expire. The lien holder cannot obtain a deed without proper service of the 22-25 notice.

43. The 2002 annual tax sale was held from April 1, 2002 to April 26, 2002. At the 2002 annual tax sale liens were sold based on property owners' failure to pay real estate taxes in 2000.

44. The 2003 annual tax sale was held from March 10, 2003 to April 4, 2003. At the 2003 annual tax sale liens were sold based on property owners' failure to pay real estate taxes in 2001.

45. The 2004 annual tax sale was held from May 10, 2004 to June 7, 2004. At the 2004 annual tax sale liens were sold based on property owners' failure to pay real estate taxes in 2002. One hundred and twenty-four tax buying entities registered to participate in the sale.

46. The 2005 annual tax sale began on July 6, 2005 and is expected to conclude on July 27, 2005. At the 2005 annual tax sale liens were sold based on property owners' failure to pay real estate taxes in

2003. At least one hundred and ninety-five tax buyers registered to participate in the sale.

The Cook County Single Simultaneous Bidder Rule

47. In order to participate in the auction, tax buyers can register at the Treasurer's Office up to thirty days before the annual tax sale begins.

48. At the time of registration, the tax buyer, or its authorized agent, must affirm under penalty of perjury its adherence to Cook County's Single Simultaneous Bidder Rule. The Rule—established before the 2001 tax sale—prohibits related bidding entities from simultaneously participating in the sale.

49. The Rule defines "related bidding entity" as "any individual, corporation, partnership, joint venture, limited liability company, business organization, or other entity that has a shareholder, partner, principal, officer, general partner or other person or entity having an ownership interest in common with, or contractual relationship with, any other registrant" in the annual tax sale.

50. As part of the registration under the Rule, the tax buyer represents and warrants that it is not affiliated with any other entity registering to bid in that: (A) It has no capital, purchase money, or other finances in common with any other bidding entity or person registering to bid at the annual auction; (B) It shares no common ownership interest or common source of funds; (C) It has no agreements to purchase or sell any parcels successfully bid on by any other registering bidding entity or person at the same sale; (D) It has no agreements to purchase or sell any parcels at the annual sale by any entity or person known to be ineligible to bid at the annual sale; (E) It does not stand to benefit financially under an agree-

ment with any other bidder at the sale concerning parcels to be bid on or purchased by another entity.

51. The Rule's purpose is to ensure that the same entity cannot increase its likelihood of obtaining a lien in the auction through two or more bidders. The Rule protects the auctioneer's just allocation of bids on a rotational basis to guarantee a fair apportionment of liens among all tax buyers who bid the lowest rates.

Sabre's Scheme To Obtain Additional Liens Beyond Its Appropriate Portion

52. Determined to provide Sabre an unfair advantage, B. Rochman and John Bridge devised methods through violations of the Single Simultaneous Bidder Rule to acquire more liens than Sabre should have been able to obtain at the 2002, 2003, 2004 and 2005 auctions.

53. Through these methods, John Bridge, B. Rochman and Sabre organized an enterprise by having numerous entities created, including Regal, DRN II, Cronus, CCJ, Georgetown, Optimum, L.C.C., Jeshay, BRB, Mud Cats, Carpus, and GJ, and coordinated these entities' activities to acquire liens in the tax sales for Sabre's benefit. John Bridge, B. Rochman and Sabre accomplished this objective through the following means: directed the principals of the respective defendant entities to create the defendant entities and/or to register for the tax sale; directed all of the defendant entities to register to participate in the tax sale by filing false attestations that they conformed with the Single, Simultaneous Bidder Rule; directed each defendant entity to transfer the certificates of purchase to Sabre following the respective tax sales in which each participated.

54. In the years 2002, 2003 and 2004, B. Rochman and John Bridge submitted false attestations under penalty of perjury that they adhered to the Single, Simultaneous Bidder Rule. Further, Rochman and Bridge falsely attested that Sabre was not affiliated with any other entity registering to bid in that: (A) It had no capital, purchase money, or other finances in common; (B) It shared no common ownership interest or common source of funds; (C) It had no agreements to purchase or sell any parcels successfully bid on by any other registering bidding entity or person at the same sale; (D) It had no agreements to purchase or sell any parcels at the annual sale by any entity or person known to be ineligible to bid at the annual sale; (E) It did not stand to benefit financially under an agreement with any other bidder at the sale concerning parcels to be bid on or purchased by another entity. (*See e.g.*, Ex. A.)

55. To the contrary, beginning in 2002, B. Rochman, John Bridge and Sabre had set in motion—through a series of secret agreements with various entities and individuals—their scheme to defraud the County and the other tax buyers through violation of the County Rule. Pursuant to those agreements, John Bridge, B. Rochman and Sabre directed the defendant entities and individuals to purchase liens for Sabre's benefit. This scheme would grow throughout the course of the next few years, ensnaring both new and pre-existing entities into the scheme to bid for Sabre's benefit.

56. Through the course of the scheme, the Defendants' improper acquisition of liens through violation of the County Rule deprived the other tax buyers, including Plaintiffs, of the opportunity to acquire tax liens and obtain deeds on the distinct parcels of real

estate, thus depriving them of the opportunity to profit from the payment of penalties on subsequent taxes and the sale of parcels for which a deed was acquired.

The 2002 Tax Sale Auction

57. B. Rochman, John Bridge and Sabre first tested the County's prosecution of the Rule at the 2002 tax sale auction. One method that B. Rochman, John Bridge, and Sabre devised to implement the scheme to obtain excessive liens for Sabre that year was to have other entities represent that they were acting on their own when in reality they were bidding secretly on Sabre's behalf in the 2002 auction.

58. In preparation for the 2002 auction, B. Rochman, John Bridge and Sabre created, or had created, an entity—Regal—to secretly bid on Sabre's behalf.

59. At the direction of John Bridge, B. Rochman, and Sabre, Jeffrey Bridge had Regal incorporated on February 26, 2002, a little over a month before the 2002 auction. On or between March 1, 2002 and April 26, 2002, at the direction of John Bridge, B. Rochman, and Sabre, and in furtherance of its role in the conspiracy, Jeffrey Bridge had Regal submit a false registration to the Cook County Treasurer's Office stating that it adhered to the Single, Simultaneous Bidder Rule. On or between April 1, 2002 and April 26, 2002—at the direction of John Bridge, B. Rochman and Sabre—Jeffrey Bridge had Regal purchase liens at the 2002 auction for Sabre's benefit. On information and belief, all or virtually all of the tax liens acquired by Regal at the 2002 sale were acquired at a penalty rate of 0%. In addition, on information and belief, Regal, at the direction of Jeffrey

Bridge, John Bridge, B.. Rochman and Sabre, transferred all the tax liens it acquired to Sabre on May 15, 2002, less than one month after the County issued Certificates of Purchase evidencing the liens to Regal. On information and belief, Regal had not paid any subsequent taxes on any of the items it had purchased. As a result, Regal could derive no income from any penalty on the underlying tax liens (because the rate was 0%), from any deed to property (because the lien was transferred long before a deed could be obtained) or from the statutory 12% penalty on the payment of subsequent taxes (because, on information and belief, subsequent taxes were not or could not be paid before the transfer to Sabre). Regal could have no financial motive to bid at the sale, obtain tax liens and transfer them in the manner that it did to Sabre unless there was some illicit arrangement between defendants. This belief is based on Plaintiffs' review of a substantial portion of County records related to the redemption of liens Regal purchased in 2002, as well as a review of County records related to a sample of liens for which petitions for deed existed. Plaintiffs do not have access to such information or assignment documents for liens that had not been either redeemed or the subject of a filed petition for deed, which documents are in the sole possession of the Defendants.

60. B. Rochman, John Bridge, and Sabre also had Nash register his entity—DRN II—for the 2002 tax sale with the purpose of bidding for Sabre's benefit.

61. On or between March 1, 2002 and April 26, 2002, at the direction of John Bridge, B. Rochman, and Sabre, and in furtherance of its role in the conspiracy, Nash had DRN II submit a false registration to the Cook County Treasurer's Office stating that it

adhered to the Single, Simultaneous Bidder Rule. On or between April 1, 2002 and April 26, 2002—at the direction of John Bridge, B. Rochman and Sabre—Nash had DRN II purchase liens at the 2002 auction for Sabre's benefit. On information and belief, all or virtually all of the tax liens acquired by DRN II at the 2002 sale were acquired at a penalty rate of 0%. In addition, on information and belief, DRN II, at the direction of Nash, John Bridge, B. Rochman and Sabre, transferred all the tax liens it acquired to Sabre on May 15, 2002, less than one month after the County issued Certificates of Purchase evidencing the liens to DRN II. On information and belief, DRN II had not paid any subsequent taxes on any of the items it had purchased. As a result, DRN II could derive no income from any penalty on the underlying tax liens (because the rate was 0%), from any deed to property (because the lien was transferred long before a deed could be obtained) or from the statutory 12% penalty on the payment of subsequent taxes (because, on information and belief, subsequent taxes were not or could not be paid before the transfer to Sabre). DRN II could have no financial motive to bid at the sale, obtain tax liens and transfer them in the manner that it did to Sabre unless there was some illicit arrangement between defendants. This belief is based on Plaintiffs' review of a substantial portion of County records related to the redemption of liens DRN II purchased in 2002, as well as a review of County records related to a sample of liens for which petitions for deed existed. Plaintiffs do not have access to such information or assignment documents for liens that had not been either redeemed or the subject of a filed petition for deed, which documents are in the sole possession of the Defendants.

62. John Bridge and B. Rochman also directed Sabre to purchase liens at the 2002 auction.

63. By filing a false registration form that failed to disclose the agreements among these entities to bid for the benefit of Sabre, each bid that Sabre, Regal and DRN II made at the 2002 tax auction was a step implementing the fraud on the Cook County Treasurer's Office, with the intended victims being all the other tax buyers that were not participating in the conspiracy—including Phoenix, Oak Park and BCS.

64. Absent the respective frauds and collusive bidding schemes that John Bridge, B. Rochman and Sabre operated and/or managed, Phoenix, Oak Park and BCS would have had an opportunity to obtain a much larger number of liens at the 2002 auction and would have enjoyed the financial benefits flowing from those purchases.

65. John Bridge, B. Rochman and Sabre were successful in their scheme to defraud the County and the other tax buyers, including Plaintiffs, at the 2002 auction.

The 2003 Tax Sale Auction

66. Having successfully implemented the scheme in 2002, John Bridge, B. Rochman and Sabre grew the conspiracy in 2003.

67. First, John Bridge and B. Rochman directed Sabre to purchase liens in its own name during the 2003 auction.

68. Then. John Bridge, B. Rochman and Sabre directed Jeffrey Bridge and Nash to have Regal and DRN II, respectively, bid for Sabre's benefit again at the 2003 sale, as they had at the 2002 auction.

69. On or between February 10, 2003 and April 4, 2003, at the direction of John Bridge, B. Rochman, and Sabre, and in furtherance of its role in the conspiracy, Jeffrey Bridge had Regal submit a false registration to the Cook County Treasurer's Office stating that it adhered to the Single, Simultaneous Bidder Rule. On or between March 10, 2003 and April 4, 2003—at the direction of John Bridge, B. Rochman and Sabre—Jeffrey Bridge had Regal purchase liens at the 2003 auction for Sabre's benefit. On information and belief, all or virtually all of the tax liens acquired by Regal at the 2003 sale were acquired at a penalty rate of 0%. In addition, on information and belief, Regal, at the direction of Jeffrey Bridge, John Bridge, B. Rochman and Sabre, transferred all the tax liens it acquired to Sabre on May 15, 2003, less than two months after the County issued Certificates of Purchase evidencing the liens to Regal. On information and belief, Regal had not paid any subsequent taxes on any of the items it had purchased. As a result, Regal could derive no income from any penalty on the underlying tax liens (because the rate was 0%), from any deed to property (because the lien was transferred long before a deed could be obtained) or from the statutory 12% penalty on the payment of subsequent taxes (because, on information and belief, subsequent taxes were not or could not be paid before the transfer to Sabre). Regal could have no financial motive to bid at the sale, obtain tax liens and transfer them in the manner that it did to Sabre unless there was some illicit arrangement between defendants. This belief is based on Plaintiffs' review of a substantial portion of County records related to the redemption of liens Regal purchased in 2003, as well as a review of County records related to a sample of liens for which petitions for deed existed.

Plaintiffs do not have access to such information or assignment documents for liens that had not been either redeemed or the subject of a filed petition for deed, which documents are in the sole possession of the Defendants.

70. On or between February 10, 2003 and April 4, 2003, at the direction of John Bridge, B. Rochman, and Sabre, and in furtherance of its role in the conspiracy, Nash had DRN II submit a false registration to the Cook County Treasurer's Office stating that it adhered to the Single Simultaneous Bidder Rule. On or between March 10, 2003 and April 4, 2003—at the direction of John Bridge, B. Rochman and Sabre—Nash had DRN II purchase liens at the 2003 auction for Sabre's benefit. On information and belief, all or virtually all of the tax liens acquired by DRN II at the 2003 sale were acquired at a penalty rate of 0%. In addition, on information and belief, DRN II, at the direction of Nash, John Bridge, B. Rochman and Sabre, transferred all the tax liens it acquired to Sabre on May 15, 2003, less than two months after the County issued Certificates of Purchase evidencing the liens to DRN II. On information and belief, DRN II had not paid any subsequent taxes on any of the items it had purchased. As a result, DRN II could derive no income from any penalty on the underlying tax liens (because the rate was 0%), from any deed to property (because the lien was transferred long before a deed could be obtained) or from the statutory 12% penalty on the payment of subsequent taxes (because, on information and belief, subsequent taxes were not or could not be paid before the transfer to Sabre). DRN II could have no financial motive to bid at the sale, obtain tax liens and transfer them in the manner that it did to Sabre unless there was some illicit arrangement between defendants. This belief is

based on Plaintiffs' review of a substantial portion of County records related to the redemption of liens DRN II purchased in 2003, as well as a review of County records related to a sample of liens for which petitions for deed existed. Plaintiffs do not have access to such information or assignment documents for liens that had not been either redeemed or the subject of a filed petition for deed, which documents are in the sole possession of the Defendants.

71. Finally, in addition to maintaining their secret agreements with the previous participants bidding on Sabre's behalf again at the 2003 sale, John Bridge, B. Rochman and Sabre were able to add new bidders—such as Cronus—for Sabre's benefit and created a new entity—CCJ—to bid for Sabre's benefit at the 2003 sale.

72. John Bridge, B. Rochman, and Sabre directed a previously existing entity—Cronus—to bid on Sabre's behalf at the 2003 auction. On or between February 10, 2003 and April 4, 2003—at the direction of John Bridge, B. Rochman and Sabre—Jensen and Varan had Cronus submit a false registration to the Cook County Treasurer's Office stating that it adhered to the Single, Simultaneous Bidder Rule. On or between March 10, 2003 and April 4, 2003—at the direction of John Bridge, B. Rochman and Sabre—Jensen and Varan had Cronus purchase liens at the 2003 tax auction for Sabre's benefit. On information and belief, all or virtually all of the tax liens acquired by Cronus at the 2003 sale were acquired at a penalty rate of 0%. In addition, on information and belief, Cronus, at the direction of Jensen, Varan, John Bridge, B. Rochman and Sabre, transferred all the tax liens it acquired to Sabre on May 15, 2003, less than two months after the County issued Certificates of Pur-

chase evidencing the liens to Cronus. On information and belief, Cronus had not paid any subsequent taxes on any of the items it had purchased. As a result, Cronus could derive no income from any penalty on the underlying tax liens (because the rate was 0%), from any deed to property (because the lien was transferred long before a deed could be obtained) or from the statutory 12% penalty on the payment of subsequent taxes (because, on information and belief, subsequent taxes were not or could not be paid before the transfer to Sabre). Cronus could have no financial motive to bid at the sale, obtain tax liens and transfer them in the manner that it did to Sabre unless there was some illicit arrangement between defendants. This belief is based on Plaintiffs' review of a substantial portion of County records related to the redemption of liens Cronus purchased in 2003, as well as a review of County records related to a sample of liens for which petitions for deed existed. Plaintiffs do not have access to such information or assignment documents for liens that had not been either redeemed or the subject of a filed petition for deed, which documents are in the sole possession of the Defendants.

73. At the direction of John Bridge, B. Rochman and Sabre—J. Rochman, Christopher Rochman and Corinne Rochman had CCJ incorporated on February 10, 2003, a month before the 2003 auction. On or between February 10, 2003 and April 4, 2003, at the direction of John Bridge, B. Rochman, and Sabre, and in furtherance of its role in the conspiracy, J. Rochman, Christopher Rochman and Corinne Rochman had CCJ submit a false registration to the Cook County Treasurer's Office stating that it adhered to the Single, Simultaneous Bidder Rule. On or between March 10, 2003 and April 4, 2003—at the direction of John Bridge, B. Rochman and Sabre—J. Rochman,

Christopher Rochman and Corinne Rochman had CCJ purchase liens at the 2003 auction for Sabre's benefit. On information and belief, all or virtually all of the tax liens acquired by CCJ at the 2003 sale were acquired at a penalty rate of 0%. In addition, on information and belief, CCJ, at the direction of J. Rochman, Christopher Rochman, Corinne Rochman, John Bridge, B. Rochman and Sabre, transferred all the tax liens it acquired to Sabre on May 15, 2003, less than two months after the County issued Certificates of Purchase evidencing the liens to CCJ. On information and belief, CCJ had not paid any subsequent taxes on any of the items it had purchased. As a result, CCJ could derive no income from any penalty on the underlying tax liens (because the rate was 0%), from any deed to property (because the lien was transferred long before a deed could be obtained) or from the statutory 12% penalty on the payment of subsequent taxes (because, on information and belief, subsequent taxes were not or could not be paid before the transfer to Sabre). CCJ could have no financial motive to bid at the sale, obtain tax liens and transfer them in the manner that it did to Sabre unless there was some illicit arrangement between defendants. This belief is based on Plaintiffs' review of a substantial portion of County records related to the redemption of liens CCJ purchased in 2003, as well as a review of County records related to a sample of liens for which petitions for deed existed. Plaintiffs do not have access to such information or assignment documents for liens that had not been either redeemed or the subject of a filed petition for deed, which documents are in the sole possession of the Defendants.

74. By filing false registration forms that failed to disclose the agreements among these entities to bid

for the benefit of Sabre, each bid that Sabre, Regal, DRN II, Cronus, and CCJ made at the 2003 tax auction was a step implementing the fraud on the Cook County Treasurer's Office, with the intended victims being all the other tax buyers that were not participating in the conspiracy—including Phoenix, Oak Park and BCS.

75. Absent the respective frauds and collusive bidding schemes that John Bridge, B. Rochman and Sabre operated and/or managed, Phoenix, Oak Park and BCS would have had an opportunity to obtain a much larger number of liens at the 2003 auction and would have enjoyed the financial benefits flowing from those purchases.

76. John Bridge, B. Rochman and Sabre successfully kept their scheme to defraud the County and the other tax buyers through violations of the Rule at the 2002 and 2003 auctions a secret. As time passed from the dates of sale for each lien wrongfully acquired and Sabre's ownership of liens grew through the assignments that Regal, DRN II, Cronus, and CCJ provided it, profits continued to roll into the coffers of John Bridge, B. Rochman and Sabre. They reaped the profits from the additional liens they were able to acquire by having multiple bidders for Sabre's benefit in violation of the Rule. They collected the penalty accrued on properties that were redeemed and received deeds for properties that were not redeemed.

The 2004 Tax Sale

77. Nonetheless, John Bridge, B. Rochman and Sabre wanted even more opportunities to gain excessive bids at the 2004 auction. They furthered their scheme to defraud in preparation for the 2004 tax

sale through the same methods that were successful for them in the 2002 and 2003 sales.

78. On information and belief, John Bridge, B. Rochman and Sabre maintained their secret agreements with the entities that had bid for Sabre's benefit in 2002 and 2003, to continue the practice at the 2004 sale. These entities, Regal, CCJ, Cronus and Jeshay (Nash's replacement for DRN II)—agreed to bid on liens that B. Rochman, John Bridge and Sabre chose before the auction. Pursuant to the secret agreements, these entities assigned all of their liens to Sabre after the auction. Sabre was thereby able to exercise more bids and obtain more liens through this scheme than was appropriate, thus injuring those tax buyers—including Phoenix, Oak Park and BCS—that complied with the County's Rule.

79. The relationships among John Bridge, B. Rochman and Sabre and the other entities allowed John Bridge, B. Rochman and Sabre to effectively and efficiently direct and control all the entities' implementation of the scheme to obtain more liens for Sabre through the secret agreement. For instance, CCJ Investments lists its address in state records at B. Rochman's address—1345 East Park Street in Carbondale, Illinois. In addition, CCJ had Kelly Penman—a registered bidder for Sabre in the 2004 sale (*see* Ex. A)—execute assignments of liens to Sabre on CCJ's behalf. An example of one of those assignments is attached as Ex. B.

80. On or about April 19, 2004, at the direction of John Bridge, B. Rochman and Sabre and in furtherance of its role in the conspiracy, Jeffrey Bridge had Regal submit a false registration to the Cook County Treasurer's Office stating that it adhered to the Single, Simultaneous Bidder Rule. On or between May

10, 2004 and June 7, 2004—at the direction of John Bridge, B. Rochman and Sabre—Jeffrey Bridge had Regal purchase 335 liens at the 2004 tax auction for Sabre's benefit, each of which was acquired at a penalty rate of 0%. On information and belief, Regal, at the direction of Jeffrey Bridge, John Bridge, B. Rochman and Sabre transferred all of the liens it purchased at the 2004 auction to Sabre. This belief is based on Plaintiffs' review of a substantial portion of County records related to the redemption of liens Regal purchased in 2004, which indicated that the liens redeemed had been previously assigned to Sabre. Plaintiffs do not have access to such information or assignment documents for liens that had not been either redeemed or the subject of a filed petition for deed, which documents are in the sole possession of the Defendants.

81. Implementing its continuing role in the conspiracy, on or around April 26, 2004, J. Rochman, Christopher Rochman and Corinne Rochman had CCJ submit a false registration to the Cook County Treasurer's Office stating that it adhered to the County Rule. On or between May 10, 2004 and June 7, 2004 at the direction of John Bridge, B. Rochman and Sabre—J. Rochman, Christopher Rochman and Corinne Rochman had CCJ purchase 352 liens at the auction, each of which was acquired at a penalty rate of 0%. On information and belief, CCJ transferred all of the liens it purchased at the 2004 auction to Sabre. This belief is based on Plaintiffs' review of a substantial portion of County records related to the redemption of liens CCJ purchased in 2004, which indicated that the liens redeemed had been previously assigned to Sabre. Plaintiffs do not have access to such information or assignment documents for liens that had not been either redeemed or the subject of a filed

petition for deed, which documents are in the sole possession of the Defendants.

82. On April 30, 2004—at the direction of John Bridge, B. Rochman and Sabre—Jensen and Varan had Cronus submit a false registration to the Cook County Treasurer's Office stating that it adhered to the Single, Simultaneous Bidder Rule. On or between May 10, 2004 and June 7, 2004—at the direction of John Bridge, B. Rochman and Sabre—Jensen and Varan had Cronus purchase 276 liens at the 2004 tax auction, each of which was acquired at a penalty rate of 0%. On information and belief, Cronus, at the direction of Jensen, Varan, John Bridge, B. Rochman and Sabre, transferred all of the liens it purchased at the 2004 auction to Sabre. This belief is based on Plaintiffs' review of a substantial portion of County records related to the redemption of liens Cronus purchased in 2004, which indicated that the liens redeemed had been previously assigned to Sabre. Plaintiffs do not have access to such information or assignment documents for liens that had not been either redeemed or the subject of a filed petition for deed, which documents are in the sole possession of the Defendants.

83. Nash incorporated Jeshay on March 11, 2004, just three months before the 2004 auction, as the replacement for the prior entity, DRN II. On April 22, 2004, at the direction of John Bridge, B. Rochman and Sabre and in furtherance of its role in the conspiracy, Nash had Jeshay submit a false registration to the Cook County Treasurer's Office stating that it adhered to the Single, Simultaneous Bidder Rule. On or between May 10, 2004 and June 7, 2004—at the direction of John Bridge, B. Rochman and Sabre—Nash had Jeshay purchase 264 liens at the 2004 tax

auction for Sabre's benefit, each of which was acquired at a penalty rate of 0%. On information and belief, Jeshay, at the direction of Nash, John Bridge, B. Rochman and Sabre transferred all of the liens it purchased at the 2004 auction to Sabre. This belief is based on Plaintiffs' review of a substantial portion of County records related to the redemption of liens Jeshay purchased in 2004, which indicated that the liens redeemed had been previously assigned to Sabre. Plaintiffs do not have access to such information or assignment documents for liens that had not been either redeemed or the subject of a filed petition for deed, which documents are in the sole possession of the Defendants.

84. Similarly, John Bridge, B. Rochman and Sabre were able to expand the conspiracy further by adding another pre-existing entity Georgetown to the conspiracy and by having Georgetown violate the County Rule by participating in the scheme to bid and purchase liens for Sabre's benefit at the 2004 tax sales.

85. On April 28, 2004, at the direction of John Bridge, B. Rochman and Sabre and in furtherance of its role in the conspiracy, Alexander had Georgetown submit a false registration to the Cook County Treasurer's Office stating that it adhered to the Single, Simultaneous Bidder Rule. Notably, Georgetown's 2004 tax sale registration originally listed the tax buying entity's name as "Sabre Group." The attestation accompanying Georgetown's registration (attached as Ex. C) shows that there was a line drawn through the Sabre Group name and the name "Georgetown" was written in instead.

86. On or between May 10, 2004 and June 7, 2004—at the direction of John Bridge, B. Rochman and Sabre—Alexander had Georgetown purchase 281

liens at the 2004 tax auction, each of which was acquired at a penalty rate of 0%. On information and belief, Georgetown, at the direction of Alexander, John Bridge, B. Rochman and Sabre transferred all of the liens it purchased at the 2004 auction to Sabre. This belief is based on Plaintiffs' review of a substantial portion of County records related to the redemption of liens Georgetown purchased in 2004, which indicated that the liens redeemed had been previously assigned to Sabre. Plaintiffs do not have access to such information or assignment documents for liens that had not been either redeemed or the subject of a filed petition for deed, which documents are in the sole possession of the Defendants.

87. In addition to conspiring with existing entities, John Bridge, B. Rochman and Sabre created, or agreed to have created, new tax buying entities for which the primary purpose was to bid for Sabre's benefit at the 2004 sale. In preparation for the 2004 auction and in the three months just prior to that auction, John Bridge, B. Rochman and Sabre added two newly formed entities to the scheme—namely, Optimum and L.C.C.

88. At the direction of John Bridge, B. Rochman and Sabre—Baumbach had Optimum incorporated on March 1, 2004, just three months before the 2004 auction. On or about April 19, 2004, at the direction of John Bridge, B. Rochman, and Sabre, and in furtherance of its role in the conspiracy, Baumbach had Optimum submit a false registration to the Cook County Treasurer's Office stating that it adhered to the Single, Simultaneous Bidder Rule. On or between May 10, 2004 and June 7, 2004—at the direction of John Bridge, B. Rochman and Sabre—Baumbach had Optimum purchase 182 liens at the 2004 tax auction

for Sabre's benefit, each of which was acquired at a penalty rate of 0%. On information and belief, Optimum, at the direction of Baumbach, John Bridge, B. Rochman and Sabre transferred all of the liens it purchased at the 2004 auction to Sabre. This belief is based on Plaintiffs' review of a substantial portion of County records related to the redemption of liens Optimum purchased in 2004, which indicated that the liens redeemed had been previously assigned to S[illegible]e. Plaintiffs do not have access to such information or assignment documents for liens that had not been either redeemed or the subject of a filed petition for deed, which documents are in the sole possession of the Defendants.

89. At the direction of John Bridge, B. Rochman and Sabre—Ellis had L.C.C. incorporated on May 4, 2004, almost one month before the 2004 auction. On April 30, 2004, at the direction of John Bridge, B. Rochman and Sabre and in furtherance of its role in the conspiracy, Ellis had L.C.C. submit a false registration to the Cook County Treasurer's Office stating that it adhered to the Single, Simultaneous Bidder Rule. On or between May 10, 2004 and June 7, 2004—at the direction of John Bridge, B. Rochman and Sabre—Ellis had L.C.C. purchase 291 liens at the 2004 tax auction for Sabre's benefit, each of which was acquired at a penalty rate of 0%. On information and belief, L.C.C., at the direction of Ellis, John Bridge, B. Rochman and Sabre transferred all of the liens it purchased at the 2004 auction to Sabre. This belief is based on Plaintiffs' review of a substantial portion of County records related to the redemption of liens L.C.C. purchased in 2004, which indicated that the liens redeemed had been previously assigned to Sabre. Plaintiffs do not have access to such information or assignment documents for liens

that had not been either redeemed or the subject of a filed petition for deed, which documents are in the sole possession of the Defendants.

90. By filing false registration forms that failed to disclose the agreements among these entities to bid for the benefit of Sabre, each bid that Sabre, CCJ, Georgetown, Optimum, Regal, L.C.C., Jeshay, and Cronus made at the 2004 tax auction was a step in implementing the fraud on the Cook County Treasurer's Office, with the intended victims being all the other tax buyers that were not participating in the conspiracy—including Phoenix, Oak Park and BCS.

91. On or between May 10, 2004, and June 7, 2004, as a result of their fraudulent conduct, Sabre, CCJ, Georgetown, Optimum, Regal, L.C.C., Jeshay, and Cronus collectively purchased 2280 liens sold at the 2004 auction, at a total value of over $6.6 million, well in excess of the 481 liens at a total value of $2.2 million that Sabre was able to purchase in its own name.

92. Absent the respective frauds and collusive bidding schemes that John Bridge, B. Rochman and Sabre operated and/or managed, Phoenix, Oak Park and BCS would have had an opportunity to obtain a much larger number of liens and would have enjoyed the financial benefits flowing from those purchases.

The 2005 Tax Sale

93. Regal, Cronus and Georgetown are bidding on Sabre's behalf in the 2005 auction. Additionally, new tax buying entities were created for the primary purpose of bidding for Sabre's benefit at the 2005 sale. The new entities were incorporated within days of each other, within one month prior to the 2005 auc-

tion, and share principals with entities that bid for Sabre's benefit in previous auctions.

94. John Bridge, B. Rochman and Sabre directed the principals of four conspirators—L.C.C., Optimum, CCJ and Jeshay—to have incorporated four new companies—BRB, Mud Cats, Carpus and GJ—in preparation for the 2005 auction. Pursuant to the scheme, the new entities were to participate in the 2005 auction in place of L.C.C, Optimum, CCJ and Jeshay. At the direction of John Bridge, B. Rochman and Sabre—J. Rochman, Christopher Rochman and Corinne Rochman had BRB incorporated on June 7, 2005. At the direction of John Bridge, B. Rochman and Sabre—Nash had Mud Cats incorporated on June 10, 2005. At the direction of John Bridge, B. Rochman and Sabre—Ellis had GJ incorporated on June 15, 2005. At the direction of John Bridge, B. Rochman and Sabre—Baumbach had Carpus incorporated on June 16, 2005. These four new entities in the 2005 auction share—through their principals—the same ties that their predecessors shared with Sabre. The principals are up to their old ways, simply donning new entity identities with which to cloak their participation in the scheme to defraud the County and the tax buyers. These new entities and their principals—in conspiracy with John Bridge, B. Rochman, Sabre, CCJ, Francis Alexander, Georgetown, Optimum, Jeffrey Bridge, Regal, L.C.C., Jeshay, Jensen, Varan, and Cronus—are continuing the scheme to defraud the County and the other tax buyers in the 2005 auction, at the direction of John Bridge, B. Rochman and Sabre.

RICO Predicate Acts

95. During the auctions held in 2002, 2003 and 2004, Sabre purchased hundreds of liens. Sabre, John

Bridge and B. Rochman prepared and caused to be prepared 22-5 notices of the lien sale and caused Cook County to mail those notices to the last tax assesses in order to ensure that Sabre could enforce the liens. On information and belief, these include liens on properties in which interested parties are located out of state. Sabre, John Bridge and B. Rochman also prepared and caused to be prepared 22-10 and 22-25 notices for the liens that were available to convert into deeds. Sabre, John Bridge and B. Rochman caused Cook County to mail these notices to enable them to convert the liens into deeds for Sabre. These mailings of the 22-5, 22-10, and 22-25 notices were integral to the scheme to profit by obtaining additional liens in violation of the County Rule. This conduct violated 18 U.S.C. 1341. Exhibit D identifies a small sample of these mailings related to the liens that Sabre purchased during the auctions held in 2002, 2003 and 2004.

96. During the auctions held in 2002, 2003 and 2004, Regal purchased hundreds of liens for Sabre's benefit in violation of the County Rule. On information and belief, these included liens on properties in which interested parties are located out of state. Regal, Sabre, Jeffrey Bridge, John Bridge and B. Rochman prepared and caused to be prepared 22-5 notices of the lien sale and caused Cook County to mail those notices to the last tax assessees in order to ensure that Sabre could enforce the liens. Regal, Sabre, Jeffrey Bridge, John Bridge and B. Rochman also prepared and caused to be prepared 22-10 and 22-25 notices for the liens that were available to convert into deeds. Regal, Sabre, Jeffrey Bridge, John Bridge and B. Rochman caused Cook County to mail these notices to enable them to convert the liens into deeds for Sabre. These mailings of the 22-5, 22-10

and 22-25 notices were integral to the scheme to profit by obtaining additional liens in violation of the County Rule. This conduct violated 18 U.S.C. § 1341. Exhibit E identifies a small sample of these mailings related to the liens that Regal purchased during the auctions held in 2002, 2003 and 2004.

97. During the auctions held in 2002 and 2003, DRN II purchased hundreds of liens for Sabre's benefit in violation of the County Rule. On information and belief, these included liens on properties in which interested parties are located out of state. DRN II, Sabre, Nash, John Bridge and B. Rochman prepared and caused to be prepared 22-5 notices of the lien sale and caused Cook County to mail those notices to the last tax assessees in order to ensure that Sabre could enforce the liens. DRN II, Sabre, Nash, John Bridge and B. Rochman also prepared and caused to be prepared 22-10 and 22-25 notices for the liens that were available to convert into deeds. DRN II, Sabre, Nash, John Bridge and B. Rochman caused Cook County to mail the 22-10 and 22-25 notices to enable them to convert the liens into deeds for Sabre. These mailings of the 22-5, 22-10 and 22-25 notices were integral to the scheme to profit by obtaining additional liens in violation of the County Rule. This conduct violated 18 U.S.C. § 1341. Exhibit F identifies a small sample of these mailings related to the liens that Cronus purchased during the auctions held in 2003 and 2004.

98. During the auctions held in 2003 and 2004, Cronus purchased hundreds of liens for Sabre's benefit in violation of the County Rule. On information and belief, these included liens on properties in which interested parties are located out of state. Cronus, Sabre, Robert Jensen, Joseph Varan, John Bridge

and B. Rochman prepared and caused to be prepared 22-5 notices of the lien sale and caused Cook County to mail those notices to the last tax assessees in order to ensure that Sabre could enforce the liens. Cronus, Sabre, Robert Jensen, Joseph Varan, John Bridge and B. Rochman also prepared and caused to be prepared 22-10 and 22-25 notices for the liens that were available to convert into deeds. Cronus, Sabre, Robert Jensen, Joseph Varan, John Bridge and B. Rochman caused Cook County to mail the 22-10 and 22-25 notices to enable them to convert the liens into deeds for Sabre. These mailings of the 22-5, 22-10 and 22-25 notices were integral to the scheme to profit by obtaining additional liens in violation of the County Rule. This conduct violated 18 U.S.C. § 1341. Exhibit G identifies a small sample of these mailings related to the liens that Cronus purchased during the auctions held in 2003 and 2004.

99. During the auctions held in 2003 and 2004, CCJ purchased hundreds of liens for Sabre's benefit in violation of the County Rule. On information and belief, these included liens on properties in which interested parties are located out of state. CCJ, Sabre, Christopher Rochman, J. Rochman, Corinne Rochman, John Bridge and B. Rochman prepared and caused to be prepared 22-5 notices of the lien sale and caused Cook County to mail those notices to the last tax assessees in order to ensure that Sabre could enforce the liens. CCJ, Sabre, Christopher Rochman, J. Rochman, Corinne Rochman, John Bridge and B. Rochman also prepared and caused to be prepared 22-10 and 22-25 notices for the liens that were available to convert into deeds. CCJ, Sabre, Christopher Rochman, J. Rochman, Corinne Rochman, John Bridge and B. Rochman caused Cook County to mail the 22-10 and 22-25 notices to enable them to convert

the liens into deeds for Sabre. These mailings of the 22-5, 22-10 and 22-25 notices were integral to the scheme to profit by obtaining additional liens in violation of the County Rule. This conduct violated 18 U.S.C. § 1341. Exhibit H identifies a small sample of these mailings related to the liens that CCJ purchased during the auctions held in 2003 and 2004.

100. During the auction held in 2004, Georgetown purchased hundreds of liens for Sabre's benefit in violation of the County Rule. On information and belief, these included liens on properties in which interested parties are located out of state. Georgetown, Sabre, Francis Alexander, John Bridge and B. Rochman prepared and caused to be prepared 22-5 notices of the lien sale and caused Cook County to mail those notices to the last tax assessees in order to ensure that Sabre could enforce the liens. 22-10 and 22-25 notices will also have to be mailed to convert unredeemed liens into deeds. These mailings of the 22-5 notices were integral to the scheme to profit by obtaining additional liens in violation of the County Rule. This conduct violated 18 U.S.C. § 1341. Exhibit I identifies a small sample of these mailings related to the liens that Georgetown purchased during the auction held in 2004.

101. During the auction held 2004, Optimum purchased hundreds of liens for Sabre's benefit in violation of the County Rule. On information and belief, these included liens on properties in which interested parties are located out of state. Optimum, Sabre, Jason Baumbach, John Bridge and B. Rochman prepared and caused to be prepared 22-5 notices of the lien sale and caused Cook County to mail those notices to the last tax assessees in order to ensure that Sabre could enforce the liens. 22-10 and 22-25

notices will also have to be mailed to convert unredeemed liens into deeds. These mailings of the 22-5 notices were integral to the scheme to profit by obtaining additional liens in violation of the County Rule. This conduct violated 18 U.S.C. § 1341. Exhibit J identifies a small sample of these mailings related to the liens that Optimum purchased during the auction held in 2004.

102. During the auction held in 2004, L.C.C. purchased hundreds of liens for Sabre's benefit in violation of the County Rule. On information and belief, these included liens on properties in which interested parties are located out of state. L.C.C., Sabre, Gregory Ellis, John Bridge and B. Rochman prepared and caused to be prepared 22-5 notices of the lien sale and caused Cook County to mail those notices to the last tax assessees in order to ensure that Sabre could enforce the liens. 22-10 and 22-25 notices will also have to be mailed to convert unredeemed liens into deeds. These mailings of the 22-5 notices were integral to the scheme to profit by obtaining additional liens in violation of the County Rule. This conduct violated 18 U.S.C. § 1341. Exhibit K identifies a small sample of these mailings related to the liens that L.C.C. purchased during the auction held in 2004.

103. During the auction held in 2004, Jeshay purchased hundreds of liens for Sabre's benefit in violation of the County Rule. On information and belief, these included liens on properties in which interested parties are located out of state. Jeshay, Sabre, Nash, John Bridge and B. Rochman prepared and caused to be prepared 22-5 notices of the lien sale and caused Cook County to mail those notices to the last tax assessees in order to ensure that Sabre could enforce

the liens. 22-10 and 22-25 notices will also have to be mailed to convert unredeemed liens into deeds. These mailings of the 22-5 notices were integral to the scheme to profit by obtaining additional liens in violation of the County Rule. This conduct violated 18 U.S.C. § 1341. Exhibit L identifies a small sample of these mailings related to the liens that Jeshay purchased during the auction held in 2004.

104. Regal, Cronus, Georgetown, BRB, Mud Cats, Carpus, and GJ are participating in the auction being held presently in 2005 to obtain liens for the benefit of Sabre in violation of the County Rule. Each of those entity defendants, along with their principals, will have to prepare 22-5 notices of the lien sale and cause Cook County to mail those notices to the last tax assessees and other interested parties in order to ensure that Sabre can enforce the liens. These defendants will have to prepare 22-10 and 22-25 notices and cause those notices to be mailed by Cook County for liens to be able to be converted to deeds. Each such mailing is an anticipated act of mail fraud in violation of 18 U.S.C. § 1341 that the related defendants presently intend to engage in.

COUNT I
Substantive Racketeering—18 U.S. C. §§ 1962(c) and 1964

105. Plaintiffs incorporate by reference the allegations of paragraph 1 through 104 of the Complaint as though fully set forth herein.

106. At all relevant times, Sabre, Regal, DRN II, Cronus, CCJ, Georgetown, John Bridge. B. Rochman, Jeffrey Bridge, Christopher Rochman, Jesse Rochman, Corinne Rochman, Robert Jensen, Joseph Varan, Francis Alexander, Jason Baumbach, Gregory

Ellis, Douglas Nash, were "persons" within the meaning of RICO, 18 U.S.C. § 1961(3). This Count is brought against each of the defendants identified in this paragraph.

107. All Defendants constitute an association-in-fact "enterprise" (the "Rigged Bidding Enterprise") as that term is defined in 18 U.S.C. § 1964(4), that engages in, and the activities of which affect, interstate commerce. The members of the Rigged Bidding Enterprise are and have been associated through time, joined in purpose and organized in a manner amenable to hierarchal and consensual decision-making, with each member fulfilling a specific and necessary role to carry out and facilitate its purpose. Specifically, Jeffrey Bridge, Christopher Rochman, Jesse Rochman, Corinne Rochman, Robert Jensen, Joseph Varan, Francis Alexander, Jason Baumbach, Gregory Ellis, and Douglas Nash incorporated and became the principals of entities, and pretended to act as legitimate, unrelated bidders at annual tax sales on behalf of those entities. Regal, DRN II, Cronus, CCJ, Georgetown, Optimum, L.C.C., Jeshay, BRB, Mud Cats, Carpus, and GJ were formed to create the appearance of legitimate, unrelated entities, registered to bid at annual tax sales, submitted false registrations to the Cook County Treasurer's Office stating that they had adhered to the Single, Simultaneous Bidder Rule, purchased liens at the annual tax sales and transferred those liens to Sabre. Sabre registered to bid at the 2002, 2003, and 2004 sales, submitted false registrations to the Cook County Treasurer's Office in connection with those sales stating that it had adhered to the Single, Simultaneous Bidder Rule, purchased liens at those tax sales in its own name, acquired liens by transfer from other defendants from the 2002, 2003 and 2004

tax sale and arranged to acquire liens obtained at the 2005 tax sale. John Bridge and B. Rochman directed the affairs of Sabre and of others which included forming entities to bid at the annual tax sale, registering those entities to bid, submitting false registrations to the Cook County Treasurer's Office falsely stating adherence to the Single, Simultaneous Bidder Rule, purchasing liens at auction, having all those liens transferred to Sabre, and insuring that participants were compensated for their participation. The planning and carrying out of the scheme would have been beyond the capacity of each member of the Enterprise acting singly and without the aid of each other.

108. Each defendant is or has been employed by and/or associated with the Rigged Bidding Enterprise.

109. On information and belief, based on the County Records and the assignments of liens filed with the County by many of the entity defendants, all of the individual defendants other than John Bridge and B. Rochman and at least some of the entity defendants, other than Sabre, received a financial benefit for their participation in the scheme. Such financial benefits for defendants were the product of the scheme and could not have been realized had Sabre not been able to secure more liens than it was entitled to and the corresponding profits from such liens.

110. Each of the defendants to this Count have mailed or caused to be mailed hundreds of mailings in furtherance of the scheme to obtain liens for the benefit of Sabre greatly in excess of the number of liens Sabre would have been allowed under the County Rule. A small sample of those mailings is iden-

tified in Exhibits D through L. Further, each of the defendants to this Count has conducted and/or participated in the conduct of the Rigged Bidding Enterprise's affairs through a pattern of racketeering activity in violation of RICO, 18 U.S.C. § 1962(c), by engaging in numerous acts of mail fraud.

111. Plaintiffs have suffered the loss of property related to the liens they would have been able to acquire, and the profits flowing therefrom, had these defendants not implemented their scheme and acquired liens in excess of their appropriate share through their violation of the County Rule. If defendants had not engaged in such conduct, Plaintiffs would have been able to obtain additional liens, additional deeds to property, and additional sums based on the statutory penalty of 12% on subsequent taxes that could have been paid. Plaintiffs do not have access to sufficient information to identify the amount of damages they have incurred because that information, the Rigged Bidding Enterprise's profits from penalties and deeds, is in the sole possession of the Defendants.

WHEREFORE, Plaintiffs respectfully prays for judgment against defendants Sabre, Regal, DRN II, Cronus, CCJ, Georgetown, John Bridge, B. Rochman, Jeffrey Bridge, Christopher Rochman, Jesse Rochman, Corinne Rochman, Robert Jensen, Joseph Varan, Francis Alexander. Jason Baumbach, Gregory Ellis, and Douglas Nash, and for relief as follows:

(a) Treble damages;

(b) Injunctive relief;

(c) Reasonable attorneys' fees and costs; and

(d) Such other relief as the Court deems just and proper.

COUNT II
Racketeering Conspiracy
18 U.S.C. §§ 1962(d) and 1964
Against All Defendants

112. Plaintiffs incorporate by reference the allegations of paragraph 1 through 111 of the Complaint as though fully set forth herein.

113. Defendants Sabre, Regal, DRN II, Cronus, CCJ, Georgetown, Optimum, L.C.C., Jeshay, BRB, Mud Cats, Carpus, GJ, John Bridge, B. Rochman, Jeffrey Bridge, Christopher Rochman, Jesse Rochman, Corinne Rochman, Robert Jensen, Joseph Varan, Francis Alexander, Jason Baumbach, Gregory Ellis, and Douglas Nash have willfully combined, conspired and agreed to violate 18 U.S.C. § 1962(c), that is to conduct and/or participate, directly or indirectly, in the conduct of the Rigged Bidding Enterprise's affairs through a pattern of racketeering activity based upon numerous acts of mail fraud, in violation of 18 U.S.C. § 1962(d).

114. The object of the conspiracy was to defraud the County and other tax buyers and improperly acquire liens through violation of the County Rule. Each defendant embraced the object of the conspiracy and knowingly acted to support and facilitate the accomplishment of its goals.

115. Plaintiffs have suffered the loss of property related to the liens they would have been able to acquire, and the profits flowing therefrom, had these defendants not implemented their scheme and acquired liens in excess of their appropriate share through their violation of the County Rule. If defendants had not engaged in such conduct, Plaintiffs would have been able to obtain additional liens, addi-

tional deeds to property, and additional sums based on the statutory penalty of 12% on subsequent taxes that could have been paid. Plaintiffs do not have access to sufficient information to identify the amount of damages they have incurred because that information, the Rigged Bidding Enterprise's profits from penalties and deeds, is in the sole possession of the Defendants.

WHEREFORE, Plaintiffs respectfully prays for judgment against defendants Sabre, Regal, DRN II, Cronus, CCJ, Georgetown, Optimum, L.C.C., Jeshay, BRB, Mud Cats, Carpus, GJ, John Bridge, B. Rochman, Jeffrey Bridge, Christopher Rochman, Jesse Rochman, Corinne Rochman, Robert Jensen, Joseph Varan, Francis Alexander, Jason Baumbach, Gregory Ellis, and Douglas Nash, and for relief as follows:

(a) Treble damages;

(b) Injunctive relief;

(c) Reasonable attorneys' fees and costs; and

(d) Such other relief as the Court deems just and proper.

COUNT III
Substantive Racketeering —
18 U.S.C. §§ 1962(c) and 1964
(Against Defendants John Bridge and B. Rochman)

116. Plaintiffs incorporate by reference the allegations of paragraph 1 through 104 of the Complaint as though fully set forth herein.

117. At all relevant times, John Bridge and B. Rochman were "persons" within the meaning of RICO, 18 U.S.C. § 1961(3).

118. Sabre is an "enterprise" within the meaning of RICO, 18 U.S.C. § 1961(4).

119. John Bridge and B. Rochman have each mailed or caused to be mailed hundreds of mailings in furtherance of the scheme to obtain liens for the benefit of Sabre greatly in excess of the number of liens Sabre would have been allowed under the County Rule by utilizing entities they had created to purchase liens for Sabre. A small sample of those mailings is identified in Exhibits D through L. John Bridge and B. Rochman each has conducted and/or participated in the conduct of the Rigged Bidding Enterprise's affairs through a pattern of racketeering activity in violation of RICO, 18 U.S.C. § 1962(c), by engaging in numerous acts of mail fraud.

120. Plaintiffs have suffered the loss of property related to the liens they would have been able to acquire, and the profits flowing therefrom, had these defendants not implemented their scheme and acquired liens in excess of their appropriate share through their violation of the County Rule. If defendants had not engaged in such conduct, Plaintiffs would have been able to obtain additional liens, additional deeds to property, and additional sums based on the statutory penalty of 12% on subsequent taxes that could have been paid. Plaintiffs do not have access to sufficient information to identify the amount of damages they have incurred because that information, the Rigged Bidding Enterprise's profits from penalties and deeds, is in the sole possession of the Defendants.

WHEREFORE, Plaintiffs respectfully prays for judgment against John Bridge and B. Rochman, and for relief as follows:

(a) Treble damages;

(b) Injunctive relief;

(c) Reasonable attorneys' fees and costs; and

(d) Such other relief as the Court deems just and proper.

COUNT IV
Racketeering Conspiracy
18 U.S.C. §§ 1962(d) and 1964
(Against All Defendants Other Than Sabre)

121. Plaintiffs incorporate by reference the allegations of paragraph 1 through 104 of the Complaint as though fully set forth herein.

122. At all relevant times, each Defendant was a "person" within the meaning of RICO, 18 U.S.C. § 1961(3).

123. Sabre is an "enterprise" within the meaning of RICO, 18 U.S.C. § 1961(4).

124. Defendants Regal, DRN II Cronus, CCJ, Georgetown, John Bridge, B. Rochman, Jeffrey Bridge, Christopher Rochman, Jesse Rochman, Corinne Rochman, Robert Jensen, Joseph Varan, Francis Alexander, Jason Baumbach, Gregory Ellis, Douglas Nash, Sabre, Regal, DRN II, Cronus, CCJ, Georgetown, Optimum, L.C.C., Jeshay, BRB, Mud Cats, Carpus, and GJ have willfully combined, conspired and agreed to violate 18 U.S.C. § 1962(c), that is to conduct and/or participate, directly or indirectly, in the conduct of Sabre's affairs through a pattern of racketeering activity based upon numerous acts of mail fraud, in violation of 18 U.S.C. § 1962(d).

125. The object of the conspiracy was to defraud the County and other tax buyers and improperly

acquire liens through violation of the County Rule. Each defendant embraced the object of the conspiracy and knowingly acted to support and facilitate the accomplishment of its goals.

126. Plaintiffs have suffered the loss of property related to the liens they would have been able to acquire, and the profits flowing therefrom, had these defendants not implemented their scheme and acquired liens in excess of their appropriate share through their violation of the County Rule. If defendants had not engaged in such conduct, Plaintiffs would have been able to obtain additional liens, additional deeds to property, and additional sums based on the statutory penalty of 12% on subsequent taxes that could have been paid. Plaintiffs do not have access to sufficient information to identify the amount of damages they have incurred because that information, the Rigged Bidding Enterprise's profits from penalties and deeds, is in the sole possession of the Defendants.

WHEREFORE, Plaintiffs respectfully prays for judgment against defendants Regal, DRN II, Cronus, CCJ, Georgetown, Optimum, L.C.C., Jeshay, BRB, Mud Cats, Carpus, GJ, John Bridge, B. Rochman, Jeffrey Bridge, Christopher Rochman, Jesse Rochman, Corinne Rochman, Robert Jensen, Joseph Varan, Francis Alexander, Jason Baumbach, Gregory Ellis, and Douglas Nash, and for relief as follows:

(a) Treble damages;

(b) Injunctive relief;

(c) Reasonable attorneys' fees and costs; and

(d) Such other relief as the Court deems just and proper.

COUNT V
TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE
(Against All Defendants)

127. Plaintiffs incorporate by reference the allegations of paragraph 1 through 104 of the Complaint as though fully set forth herein.

128. As indicated in detail above, Sabre, Regal, DRN II, CCJ, Cronus, Georgetown, Optimum, L.C.C., Jeshay, BRB, Mud Cats, Carpus and GJ each participated in one or more of the auctions held in 2002, 2003, 2004 and 2005, each bidding on and purchasing liens for Sabre's benefit in violation of the County Rule.

129. Phoenix, Oak Park and BCS were registered tax buyers at the 2002, 2003, 2004 and 2005 tax sale auctions.

130. Phoenix, Oak Park and BCS had a reasonable expectation of entering into respective, valid business relationships with the Cook County Treasurer's Office at the 2002, 2003, 2004 and 2005 tax sale auctions.

131. John Bridge, B. Rochman, Sabre, Christopher Rochman, J. Rochman, Corinne Rochman, CCJ, Francis Alexander, DRN II, Georgetown, Optimum, Jeffrey Bridge, Regal, Ellis, L.C.C., Jeshay, Jensen, Varan, Nash, Baumbach, Cronus, BRB, Mud Cats, Carpus and GJ knew of the Plaintiffs' expectancies for the tax sales in which each of the respective defendants participated.

132. Nevertheless, John Bridge, B. Rochman, Sabre, Christopher Rochman, J. Rochman, Corinne Rochman, CCJ, Francis Alexander, DRN II,

Georgetown, Optimum, Jeffrey Bridge, Regal, Ellis, L.C.C., Jeshay, Jensen, Varan, Nash, Baumbach, Cronus, BRB, Mud Cats, Carpus and GJ purposefully interfered in the respective tax sales in which each participated by filing false registrations and conspiring to violate the Single Simultaneous Bidder Rule, thereby usurping Plaintiffs' opportunity to obtain a much larger number of liens and preventing the Plaintiffs' legitimate expectancies from ripening into valid business relationships with the Cook County Treasurer's Office.

133. Absent the respective frauds and collusive bidding schemes of the defendants, Phoenix, Oak Park and BCS would have had an opportunity to obtain a much larger number of liens and would have enjoyed the financial benefits flowing from those purchases opportunity to bid successfully on a larger number of liens and would have enjoyed the financial benefits flowing from those purchases.

WHEREFORE, Plaintiffs Phoenix, Oak Park and BCS respectfully request that this Court grant judgment in its favor and against defendants John Bridge, B. Rochman, Sabre, Christopher Rochman, J. Rochman, Corinne Rochman, CCJ, DRN II, Francis Alexander, Georgetown, Optimum, Jeffrey Bridge, Regal, Ellis, L.C.C., Jeshay, Jensen, Varan, Nash, Baumbach, Cronus, BRB, Mud Cats, Carpus and GJ:

(a) Award of damages to compensate the Plaintiffs for their loss of profits from the defendants improper purchase of liens and other incidental and consequential damages including, but not limited to, the financial benefits flowing from successful bids; and

(b) Granting such other relief as the Court deems fair and just.

Dated: July 14, 2005

PHOENIX BOND & INDEMNITY, CO., OAK PARK INVESTMENTS, INC. and BCS SERVICES, INC.

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One of Their Attorneys

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(8)

No. 07-210

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SUPREME COURT, U.S.

In the Supreme Court of the United States

JOHN BRIDGE, *et al.*,
Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX
Volume II of II

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PETITION FOR CERTIORARI FILED AUGUST 15, 2007
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Exhibit A

BEST AVAILABLE COPY

Office of the County Treasurer
COOK COUNTY, ILLINOIS
COUNTY BUILDING
118 N. CLARK STREET, ROOM 212
Chicago, Illinois 60602

MARIA PAPPAS
COUNTY TREASURER

Directions: **This receipt MUST be signed by the tax buyer.** Attach this receipt to the top of your complete packet. A tax buyer is not eligible to bid and the Cook County Collector will neither acknowledge nor accept any bid from a tax buyer who does not sign this receipt.

1. I have received a copy of the Tax Sale Rules and Regulations.
2. I have read and understand the Tax Sale Rules and Regulations.
3. I agree to comply with these Rules and Regulations.
4. I have received the 2002 Annual Tax Sale Registration Forms, the Acknowledgement of Single, Simultaneous Bidder Rule, and this Receipt.

(Tax Buyer Signature)

Dated: 4/23/04

(please print)

TAX BUYER NAME: SABRE GROUP, LLC

ADDRESS: 31 HOMEWOOD DRIVE

CARBONDALE, IL 62901

TELEPHONE: (618) 457-4334 (LOCAL)(312)251-1333

FACSIMILE: (618) 529-4880 LOCAL -(312) 251-0133

E-MAIL: KEVSGSICH@AOL.COM

REGISTRATION #: 02-066

Maria Pappas
Cook County Treasurer and Ex-Officio County Collector
Cook County, Illinois

02-066
Registration Number

2002 Annual Tax Sale Registration

251-1333

Section I

REGISTERED TAX BUYER – Legal entity to which Certificates of Purchase will be issued:

Name: SABRE GROUP, LLC

Address: 31 HOMEWOOD DR.

City: CARBONDALE State: IL Zip: 62901

Telephone: (618) 457-4334 FAX: (618) 529-4880

E-Mail: Kev5sic@aol.com SSN:

FEIN: [redacted]

Section II

AUTHORIZED BIDDERS – Only the following individuals are authorized to bid on behalf of and bind the above-named Tax Buyer (**Remember to attach photocopy of all bidders' photo identification**):

Name/SSN	Address	Telephone, FAX & E-Mail
1. JOHN BRIDGE SSN: [redacted]	31 HOMEWOOD DR. CARBONDALE, IL 62901	(618) 457-4334 (618) 529-4880
2. JOSHUA BRIDGE SSN: [redacted]	31 HOMEWOOD DR. CARBONDALE, IL 62901	(618) 457-4334 (618) 529-4880
3. Kenneth Rahaan SSN: [redacted]	31 HOMEWOOD DR. CARBONDALE, IL 62901	(618) 457-4334 (618) 529-4880
4. Kelly Penman SSN: [redacted]	31 HOMEWOOD DR. CARBONDALE, IL 62901	(618) 457-4334 (618) 529-4880

FOR OFFICE USE ONLY

[X] LOC [ ] CC [ ] MO [ ] BOND $ 2,000,000 .00

[X] Registration signed by all bidders [X] ID for all bidders

INITIAL REVIEW BY: _____ APPROVED BY: EA

1

Section III

Identify the legal status of the tax buying entity named in Section I (Select ONLY one):

Individual ☐ Assumed Name ☐ Partnership ☐

Limited Partnership ☐ Corporation/LLC ☒ 501(c)(3) ☐

If you selected "Individual", you may skip to Section V.

Section IV

If you are buying under an **Assumed Name**, please provide the following:

County/State in which your Assumed Name is filed: _____
Name of person buying under assumed name: _____
Address of person: _____ City: _____
State: _____ Zip: _____ Telephone: _____
FAX: _____ E-Mail: _____

For each person having an ownership or profit sharing interest in the Assumed Name entity, give the following information (use an additional sheet of paper if necessary):

Name/SSN	Address	Telephone, FAX & E-Mail
1. _____	_____	_____
SSN: _____	_____	_____
		_____
2. _____	_____	_____
SSN: _____	_____	_____
		_____
3. _____	_____	_____
SSN: _____	_____	_____
		_____

If the tax buyer is a **Partnership**, please provide the following regarding ALL PARTNERS (general, limited, equity or other) (use an additional sheet of paper if necessary):

Name/SSN	Address	Telephone, FAX & E-Mail
1. _____	_____	_____
SSN: _____	_____	_____
		_____

2. _____ _____ _____
SSN: _____ _____ _____
_____

3. _____ _____ _____
SSN: _____ _____ _____
_____

If the tax buyer is a **Limited Partnership/LLP**, please provide the following:

State in which Limited Partnership or LLP is registered: _____
Name of the Registered Agent or Officer: _____
Address of Registered Agent or Officer: _____

In addition, give the following information for each member of the Limited Partnership/LLP (use an additional sheet of paper if necessary):

Member Name/SSN	Address	Telephone, FAX & E-Mail
1. _____	_____	_____
SSN: _____	_____	_____
		_____
2. _____	_____	_____
SSN: _____	_____	_____
		_____
3. _____	_____	_____
SSN: _____	_____	_____
		_____

If the tax buyer is a **Corporation/LLC**, please provide the following:

State of Incorporation: ILLINOIS Year of Incorporation: 2001
Is the Corporation in Good Standing: (Yes) / No
If the Corporation is not an Illinois Corporation, is the Corporation licensed to do business in Illinois: Yes / No
Is the Corporation Publicly Held: Yes / (No)

Name of Registered Agent: JAMES MORRIS
Address of Registered Agent: 805 W. DEYOUNG ST., MARION, IL 62959

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For each person with a stock or profit sharing interest in the corporation, please provide the following, (use an additional sheet of paper if necessary):

Name/SSN	Address	Telephone, FAX & E-Mail
1. BARRETT ROCHMAN SSN: [redacted]	31 HOMEWOOD DRIVE CARBONDALE, IL 62901	(618) 457-4334 (618) 529-4880
2. CHARLES DECKER SSN: [redacted]	31 HOMEWOOD DRIVE CARBONDALE, IL 62901	(618) 457-4334 (618) 529-4880
3. SSN:		

If the tax buyer is a **501(c)(3) Charitable Organization**, please provide the following:

Name of Chief Executive Officer: _____

Address of headquarters: _____

Do you have tax exempt status with the Illinois Department of Revenue? Yes / No

Section V

REPRESENTATIONS AND WARRANTIES

I represent and warrant, except as is fully disclosed below, with copies of the documentation of the matters disclosed, that the bidding entity registering to be permitted to participate in the 2002 Annual Sale is not affiliated with any other entity or person registering to bid at the 2002 Annual Sale, in that:

(A) It has no capital, purchase money, or other finances in common with any other bidding entity or person registering to bid at the 2002 Annual Sale;

(B) It shares no common ownership interest or common source of funds with any other bidding entity or person registering to participate at the 2002 Annual Sale;

(C) It has no agreements to purchase or sell any parcels successfully bid on at the 2002 Annual Sale by any other registering bidding entity or person at the 2002 Annual Sale;

(D) It has no agreements to purchase or sell any parcels successfully bid on at the 2002 Annual Sale by any entity or person known to be ineligible to bid at the 2002 Annual Sale;

(E) It does not stand to gain financially pursuant to an agreement with another bidding entity registering for the 2002 Annual Sale concerning parcels to be bid upon or purchased by such other entity at the 2002 Annual Sale.

Explanations, if needed:

Attach additional pages if necessary. Attach exhibits, if any, to application.

Each of the undersigned states under oath or affirmation pursuant to §1-109 of the Illinois Code of Civil Procedure that all of the information set forth in this registration is true, correct, and complete.

Signature of Purchaser

Date: 4/23/04

Signature(s) of ALL Registered Bidder(s):

1.
2.
3.
4.

5

OFFICE OF THE COOK COUNTY TREASURER
COOK COUNTY, ILLINOIS
ROOM 212, COUNTY BUILDING
CHICAGO, ILLINOIS 60602

Acknowledgement of Single, Simultaneous Bidder Rule

As in prior tax sales, the Cook County Treasurer will enforce the Single, Simultaneous Related Bidding Entity[1] rule.

This rule provides that one tax buying entity (principal) may not have its/his/her/their actual or apparent agents, employees, or related entities, directly or indirectly register under multiple registrations for the intended or perceived purpose of having more than one person bidding at the tax sale at the same time for the intended or perceived purpose of increasing the principal's likelihood of obtaining a successful bid on a parcel.

This rule does not prevent a single bidder from alternating the identity of the buyer for whom they are bidding at any given time, so long as related bidding entities, or entities perceived to be related, are not bidding at the same time.

The determination of whether registered entities are related, so as to prevent the entities from bidding at the same time, is in the sole and exclusive discretion of the Cook County Treasurer or her designated representatives.

By signing below, I certify under penalty of perjury pursuant to § 1-109 of the Illinois Code of Civil Procedure, that I am a duly authorized agent, officer, or representative for Sabre Group LLC *; that I have received and understand the above-stated rules; that at no time during the 2002 Annual Tax Sale shall I, or the entity that I represent, or an entity directly or indirectly related to the above tax buyer, have multiple bidders registered as separate bidding entities, simultaneously bidding at the 2002 Annual Sale.*

I agree that if the tax buying entity that I represent is challenged by the Cook County Treasurer with respect to having related, or allegedly related, entities simultaneously bidding at the Annual Sale, that all such disputes shall have as exclusive venue and jurisdiction in the Circuit Court of Cook County.

Authorized Agent for the above Tax Buyer — Date: 4/23/04

Barrett Rochman
Printed Name

[1] "Related Bidding Entity" is defined as any individual, corporation, partnership, joint venture, limited liability company, business organization, or other entity that has a shareholder, partner, principal, officer, general partner or other person or entity having an ownership interest in common with, or contractual relationship with, any other registrant in the 2002 Annual Tax Sale.

OFFICE OF THE COOK COUNTY TREASURER
COOK COUNTY, ILLINOIS
ROOM 222, COUNTY BUILDING
CHICAGO, ILLINOIS 60602

June 11, 2004

SABRE Group, LLC
31 Homewood Dr.
Carbondale, IL 62901

Re: Return of Collateral
Buyer Number: *02-00066*

Dear Tax Buyer:

Enclosed is your letter of credit # 10-04 that was posted with our office for the 2002 Annual Tax Sale. Please return this letter of credit to the financial institution along with the enclosed letter for their records.

By signing the bottom of this letter, you acknowledge receipt of the aforementioned letter of credit.

If you have further questions regarding this matter, you may contact the undersigned, (312) 603-5494.

Sincerely,

Gina Quesada
Legal Department

Thomas J. Perez
Thomas J. Perez
6/17/04

Per phone Conversation
w/ John Budyl
OK Pickup by

OFFICE OF THE COOK COUNTY TREASURER
COOK COUNTY, ILLINOIS
ROOM 222, COUNTY BUILDING
CHICAGO, ILLINOIS 60602

June 11, 2004

First National Bank of Carmi
201 E. Main St.
Carmi, IL 62821

Re: Your customer: SABRE Group, LLC
Letter of Credit: # 10-04

Dear Sir or Madam:

Your client has satisfied all purchasing requirements for the 2002 Annual Tax Sale. This office will not need to draw on your letter of credit, referenced above.

If you have further questions regarding this matter, you may contact the undersigned, (312) 603-5494.

Sincerely,

Gina Quesada
Legal Department

/GQ

OFFICE OF THE COOK COUNTY TREASURER
COOK COUNTY, ILLINOIS

Request to Reduce Collateral or Cancel Registration: 2002 Annual Tax Sale

I, Kelly Penman, a duly authorized agent for the following entity registered as a tax buyer at the 2002 Cook County Annual Tax Sale:

Buyer Name: SABRE GROUP, LLC

Buyer Number: 66; hereby request to:

[X] Withdraw the letter of credit deposited as collateral & cancel the buyer's registration;

[ ] Withdraw the bond posted as collateral & cancel the buyer's registration;

[ ] Withdraw all certified funds deposited as collateral & cancel the buyer's registration;

[ ] Reduce the certified funds deposited by $ _____, and continue to maintain the buyer's registration.

Checks will be made payable in the name of the registered buyer only. Checks will only be mailed to buyers at their registration address.

I certify that prior to withdrawing or reducing collateral for the above-referenced buyer that said buyer has satisfactorily paid for all tax purchases made by them at the 2002 Annual Sale, and that if subsequent payment is later determined necessary by the Cook County Treasurer for any tax purchase made by the above buyer, that said registered buyer will remain liable for any such unpaid tax purchases.

Printed Name: Kelly Penman Signature: Kelly Penman

Telephone: (312) 251-1333 FAX: (312) 251-0133

E-Mail: bellbell817@hotmail.com

Date: 10/8/04

02-066

FIRST BANK

Established 1893

UNCONDITIONAL AND IRREVOCABLE LETTER OF CREDIT

BENEFICIARY
Maria Pappas
Treasurer and Ex-Officio Collector
Cook County, IL
118 N. Clark Street, Room 212
Chicago, IL 60602

APPLICANT
Sabre Group, LLC
P. O. Box 3074
31 Homewood Dr.
Carbondale, IL 62902

Date: May 10, 2004

To the Treasurer and Ex-Officio Collector:

We hereby issue the Unconditional and Irrevocable Letter of Credit No. 10-04 in favor of the Beneficiary for the account of Sabre Group, LLC up to the aggregate amount of Two Million Dollars ($2,000,000.00).

This credit is issued, presentable and payable on sight at The First National Bank of Carmi, Carmi, Illinois. Drawings may be made by facsimile, attention Jack I. Martin, Senior Vice President, 201 E. Main Street, Carmi, Illinois, 62821 at (618) 382-5881. Information may be obtained from Jack I. Martin, Senior Vice President (618)382-4118. If the drawing is made by facsimile, the original drawing document shall be mailed, on the same day, to the attention of Jack I. Martin, Senior Vice President at The First National Bank of Carmi, 201 E. Main Street, Carmi, Illinois 62821, or delivered within 24 hours to the attention of the same person at the indicated address.

Funds under this Letter of Credit are available to the Beneficiary unconditionally against sight drafts or facsimile purporting to be signed by the Beneficiary (whether actual or acting) for any sum or sums not exceeding a total of Two Million ($2,000,000.00) drawn on our Office mentioning the Letter of Credit by number and Applicant. The sight draft or facsimile shall state that Applicant has failed to complete a payment of the amount she/he/it has successfully bid for taxes at the 2002 Annual Tax Sale, or shall state that the drawing is being made at the unilateral discretion of the Treasurer and Ex-Officio Collector and shall further state that the reason for the drawing (which reason is also within the sole and exclusive discretion of the Treasurer and Ex-Officio Collector). Funds drawn under this Letter of Credit shall be sent by overnight delivery to the Beneficiary at the address listed above.

Partial and multiple drawings are permitted.

This Letter of Credit shall expire at 12 Noon Chicago time on August 13, 2004, unless prior to the expiration date a request is made in writing to this Office by the Beneficiary, attention Jack I. Martin, Senior Vice President at The First National Bank of Carmi, 201 E. Main Street, Carmi, IL 62821 requesting an extension, in which case it shall automatically be renewed for one year.

This Letter of Credit sets forth in full the terms of this Office's undertaking, and may be amended only by a written amendment signed by us and by the beneficiary. Our obligations are primary obligations to the beneficiary. We shall honor drafts drawn and presented hereunder and in compliance with the terms of the Letter of Credit.

If there are any disputes or claims with respect to this Letter of Credit, venue and jurisdiction shall lie exclusively with Circuit Court of Cook County, Illinois.

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Publication No. 500, 1993 revision ("UPC"), and the Uniform Commercial Code, Letter of Credit, 810 ILCS 5/5-101 et seq. as amended, and as in effect in the State of Illinois ("UCC"). To the extent the provisions of the UCP and the UCC shall conflict, the provisions of the UCC shall govern.

The First National Bank of Carmi

Alvin D. Fritschle
President

Albion	Carmi	Enfield	Grayville	Mt. Carmel	West Carmi
26 E. Elm	201 E. Main	105 E. Main	102 S. Court	601 Market	1206 W. Main
Albion, IL 62806	Carmi, IL 62821	Enfield, IL 62835	Grayville, IL 62844	Mt. Carmel IL 62863	Carmi, IL 62821
Tel. 618.445.2371	Tel. 618.382.4118	Tel. 618.963.2313	Tel. 618. 375.2200	Tel. 618. 263.3833	Tel. 618. 382.3195
Fax. 618.445.3958	Fax. 618. 382.5881	Fax .618.963.2613	Fax. 618. 375.6904	Fax. 618. 262.7929	Fax. 618. 382.8393

www.surffirst.net E-Mail: [illegible]

ILLINOIS

SERVICES PROGRAMS PRESS PUBLICATIONS DEPARTMENTS CONTACT

LLC FILE DETAIL REPORT

[redacted]	SABRE GROUP, LLC	[redacted]	00511706
[redacted]	GOODSTANDING	[redacted]	01/06/2004
[redacted]	LLC	[redacted]	Domestic
[redacted]	01/29/2001	[redacted]	IL
[redacted]	MICHAEL A. LANGENSTEIN	[redacted]	08/01/2002
[redacted]	31 HOMEWOOD DR PO BOX 3074	[redacted]	31 HOMEWOOD DR CARBONDALE 62901
[redacted]	CARBONDALE	[redacted]	MBR
[redacted]	62902	[redacted]	12/31/2021
[redacted]	00/00/0000	[redacted]	2005
[redacted]	03/28/2001 - SABRE INVESTMENTS, LLC		

Return to the Search Screen

BACK TO CYBERDRIVEILLINOIS.COM

Exhibit B

2C 11/9/05

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - COUNTY DIVISION

5 COTD 2127

IN THE MATTER OF THE APPLICATION OF THE COUNTY COLLECTOR FOR JUDGMENT AND ORDER OF SALE AGAINST LANDS AND LOTS RETURNED DELINQUENT FOR NONPAYMENT OF GENERAL TAXES AND/OR SPECIAL ASSESSMENTS FOR THE YEAR 2001 AND PRIOR YEARS

PETITION OF: Sabre Group, L.L.C.

NO.:
CERTIFICATE NO.: 01-0000468
VOLUME NO.: 015

C

05 NOV 14 DEPUTY CLERK

PETITION FOR TAX DEED

NOW COMES Sabre Group, L.L.C., Petitioner herein and, in Petition to this Honorable Court for Tax Deed, states as follows:

1. The following described real estate was sold on March 10, 2003, at the annual tax sale held on said date by the Cook County Treasurer of Cook County, Illinois; which sale of said property was held in accordance with the judgment of this court duly entered after due notice had been made in accordance with the Illinois Property Tax Code, as amended:

Lot 6 in Block 65 in Chicago Heights, a Subdivision in the Southwest 1/4 of Section 21, Township 35 North, Range 14 East of the Third Principal Meridian, in Cook County, Illinois.

Permanent Index Number: 32-21-311-020-0000

2. That a Certificate of Purchase, No. 01-0000468 was duly issued or assigned to Sabre Group, L.L.C., your Petitioner, which is still the owner of said Certificate.

3. That a true and exact copy of the aforementioned Certificate of Purchase is attached hereto and made a part hereof as Exhibit "A".

4. That said real estate has not been redeemed from said tax sale and that the time for redemption will expire on November 2, 2005.

5. That all taxes and special assessments which became due and payable on said parcel(s) of real estate subsequent to the date of said sale and prior to and including the

date of the filing of this petition will be redeemed. Prior to the entry of an order directing the County Clerk to issue a tax deed, all other taxes and special assessments falling due on said parcel(s) of real estate between the date of filing this Petition and the date of said order, if any, will be paid and all forfeitures and sale occurring in said interval, if any, will be redeemed.

6. That all notices required by law to be given will be given prior to the entry of an order directing the issuance of a tax deed to said parcel(s) of real estate to petitioner unless redemption is made within the time and in the manner provided by law.

7. That your Petitioner has complied with and will hereafter fully comply with all provisions of Statutes and of the Constitution of the State of Illinois relative hereto and will be entitled to the issuance of a Tax Deed if the real estate herein is not redeemed from the sale within the time allowed by law.

WHEREFORE, your Petitioner prays:

A. That this Honorable Court doth find:

1. that due notice of said tax sale and of the time for redemption therefrom has been given to all parties entitled thereto as required by law;

2 that due notice of the filing of this Petition has been given to all parties entitled thereto as required by law;

3. that all general taxes and special assessments which became due and payable on the real estate herein subsequent to the date of sale herein have been paid or redeemed as required by law;

4. that your Petitioner has fully complied with all applicable provisions of the Illinois Property Tax Code, as amended, and of all other applicable statutes of the State of Illinois and the Constitution of the State of Illinois, entitling Petitioner to a Tax Deed, and

5. that no redemption has been made from the tax sale herein prior to the expiration of time of redemption.

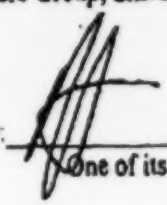
B That this Honorable Court enter an Order directing the County Clerk of Cook County to issue a Tax Deed to your Petitioner

C That this Honorable Court enter an Order as may be necessary to

place and maintain Petitioner, as grantee, in possession of said real estate.

D. That this Honorable Court grant such other and further and different relief in the premises as the nature of this case may require.

Sabre Group, L.L.C., Petitioner

By: 
One of its Attorneys

Heather A. Ottenfeld. # 39731
Attorney for Petitioner
120 West Madison Street, Suite 918
Chicago, Illinois 60602
(312) 251-1333

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

CERTIFICATE NUMBER 01-0000458

--CERTIFICATE OF PURCHASE--

FOR GENERAL TAXES AND SPECIAL ASSESSMENTS, A.D. 2001, ETC.

I, DAVID D. ORR, County Clerk in and for the County and State aforesaid DO HEREBY CERTIFY THAT CCJ INVESTMENTLLC did, on the day hereinafter set forth, purchase at Public Auction, at the Court House in CHICAGO, the property designated by PERMANENT REAL ESTATE NUMBER 32-21-311-020-0000, situated in said County for the taxes, interest and costs due and unpaid thereon for the tax year 2001 and prior and paid as purchase money on said property the total amount of taxes, interest and costs thereon as stated herein

VOLUME 015 PERMANENT INDEX NUMBER 32-21-311-020-0000

TAXES	Date of Sale	Rate of Percent Sold			Total Amt. of TAXES and Interest	Date Paid
	03/10/03	0.00	Tax	505.11		03/10/03
GENERAL 2001			Interest	38.20		
					547.31	
BACK TAX YRS -			Tax			
			Interest			
SPECIAL ASSESSMENT 2002			Tax			
			Interest			
STATUTORY TREASURER FEES					227.37	
STATUTORY CLERK FEES					47.00	
PRIOR YEARS' SPECIAL & GENERAL TAXES						
20						
20						
20						
20						
TOTAL					821.68	

Received this 27 day of MARCH , 2003 , the sum of $ 821.68 the amount of the purchase money on the above property.

If the aforesaid property is not redeemed in the manner and within the time provided by law, the above-named purchaser, his heirs or assigns, will, upon application and compliance with the provisions of law pertaining thereto, be entitled to receive a deed of conveyance for said real estate herein described by said permanent index number; provided that unless the holder of this certificate shall take out said deed, as entitled by law, and file same for record within one year from and after expiration of the time of redemption, the said certificate or deed, and the sale upon which it is based, shall from and after the expiration of one year, be absolutely null.

WITNESS my hand and the official seal at CHICAGO in said County this 27 day of MARCH , A.D., 2003

Assessee

Countersigned:

Maria Pappas
County Treasurer and Ex-Officio Collector of Cook County

David D. Orr
County Clerk of Cook County

STATE OF ILLINOIS)
COUNTY OF COOK) ss

In consideration of the sum of TEN DOLLARS, I do hereby sell, assign, transfer and set over to SABRE GROUP, LLC, his heirs, executors, administrators and assigns, the within CERTIFICATE OF PURCHASE, and all my right, title and interest in or to the real estate therein described, to have and to hold the same to himself, his heirs, executors, administrators and assigns, to his and their sole use, benefit and behoof forever.

Given under my hand and seal this 13th day of MAY A.D. 2005

Kelly Penman

By: CCJ Investments, LLC
Kelly Penman, Agent

SCOMD 2127

05 JUN 14 AM 11:43

COOK COUNTY CLERK

Exhibit C

BEST AVAILABLE COPY

Office of the County Treasurer
COOK COUNTY, ILLINOIS
COUNTY BUILDING
118 N. CLARK STREET, ROOM 212
Chicago, Illinois 60602

MARIA PAPPAS
COUNTY TREASURER

Directions: **This receipt MUST be signed by the tax buyer.** Attach this receipt to the top of your complete packet. A tax buyer is not eligible to bid and the Cook County Collector will neither acknowledge nor accept any bid from a tax buyer who does not sign this receipt.

1. I have received a copy of the Tax Sale Rules and Regulations.
2. I have read and understand the Tax Sale Rules and Regulations.
3. I agree to comply with these Rules and Regulations.
4. I have received the 2002 Annual Tax Sale Registration Forms, the Acknowledgement of Single, Simultaneous Bidder Rule, and this Receipt.

X Frances L. Alexander
(Tax Buyer Signature)

X Dated: 4/19/04

(please print)

TAX BUYER NAME: GEORGETOWN INVESTORS LLC

ADDRESS: P.O. BOX 565 / 40 TERRY DRIVE
SUGAR GROVE, IL 60554

TELEPHONE: 630-466-1211

FACSIMILE: 630-466-1299

E-MAIL: falex1211@aol.com

REGISTRATION #: 02-072

Cook County Treasurer and Ex-Officio County Collector
Cook County, Illinois

02-072
Registration Number

2002 Annual Tax Sale Registration

Section I

REGISTERED TAX BUYER – Legal entity to which Certificates of Purchase will be issued:

Name: ~~FEIN~~ GEORGETOWN INVESTORS LLC

Address: P.O. BOX 565 / 40 TERRY DRIVE ~~60554~~

City: SUGAR GROVE State: IL Zip: 60554

Telephone: 630-466-1211 FAX: 630-466-1299

E-Mail: fuley1211@aol.com SSN: [redacted]

* FEIN: 20-1047180

Section II

* AUTHORIZED BIDDERS – Only the following individuals are authorized to bid on behalf of and bind the above-named Tax Buyer (Remember to attach photocopy of all bidders' photo identification):

Name/SSN	Address	Telephone, FAX & E-Mail
1. Caitlin M Siegert SSN: [redacted]	38Te Sauk trail Park Forest, IL, 60466	(708) 748-5602
2. Patrick Siegert SSN: [redacted]	38Te Sauk trail park forest, IL, 60466	(708) 748-5602
3. SSN:		
4. SSN:		

FOR OFFICE USE ONLY

[ ] LOC [X] CC [ ] MO [ ] BOND $ 200,000 .00

[ ] Registration signed by all bidders [ ] ID for all bidders

INITIAL REVIEW BY: LI APPROVED BY: Elf

1

Section III

Identify the legal status of the tax buying entity named in Section I (Select ONLY one):

Individual ☐ Assumed Name ☐ Partnership ☐

Limited Partnership ☐ Corporation/LLC ☑ 501(c)(3) ☐

If you selected "Individual", you may skip to Section V.

Section IV

If you are buying under an **Assumed Name**, please provide the following:

County/State in which your Assumed Name is filed: _____
Name of person buying under assumed name: _____
Address of person: _____ City: _____
State: _____ Zip: _____ Telephone: _____
FAX: _____ E-Mail: _____

For each person having an ownership or profit sharing interest in the Assumed Name entity, give the following information (use an additional sheet of paper if necessary):

Name/SSN	Address	Telephone, FAX & E-Mail
1. _____ SSN: _____	_____ _____	_____ _____ _____
2. _____ SSN: _____	_____ _____	_____ _____ _____
3. _____ SSN: _____	_____ _____	_____ _____ _____

If the tax buyer is a **Partnership**, please provide the following regarding ALL PARTNERS (general, limited, equity or other) (use an additional sheet of paper if necessary):

Name/SSN	Address	Telephone, FAX & E-Mail
1. FRANCES ALEXANDER SSN: [redacted]	40 TERRY DR SUGAR GROVE, IL 60554	(630) 466-1211 (630) 466-1299

2. _____ _____ _____
SSN: _____ _____ _____
_____

3. _____ _____ _____
SSN: _____ _____ _____
_____

If the tax buyer is a **Limited Partnership/LLP**, please provide the following:

State in which Limited Partnership or LLP is registered: _____
Name of the Registered Agent or Officer: _____
Address of Registered Agent or Officer: _____
_____

In addition, give the following information for each member of the Limited Partnership/LLP (use an additional sheet of paper if necessary):

Member Name/SSN	Address	Telephone, FAX & E-Mail
1. _____ SSN: _____	_____ _____	_____ _____ _____
2. _____ SSN: _____	_____ _____	_____ _____ _____
3. _____ SSN: _____	_____ _____	_____ _____ _____

If the tax buyer is a **Corporation/LLC**, please provide the following:

State of Incorporation: Illinois Year of Incorporation: 2003
Is the Corporation in Good Standing: Yes / No
If the Corporation is not an Illinois Corporation, is the Corporation licensed to do business in Illinois: Yes / No
Is the Corporation Publicly Held: Yes / No

* Name of Registered Agent: Francis L. Alexander
Address of Registered Agent: PO Box 565 / 140 Terry Drive
_____

For each person with a stock or profit sharing interest in the corporation, please provide the following, (use an additional sheet of paper if necessary):

Name/SSN	Address	Telephone, FAX & E-Mail
1. FRANCES ALEXANDER SSN: [redacted]	40 TERRY DR. SUGAR GROVE, IL 60554	(630) 466-1211 (630) 466-1299
2. SSN:		
3. SSN:		

If the tax buyer is a 501(c)(3) Charitable Organization, please provide the following:

Name of Chief Executive Officer: _____

Address of headquarters: _____

_____

Do you have tax exempt status with the Illinois Department of Revenue? Yes / No

Section V

REPRESENTATIONS AND WARRANTIES

I represent and warrant, except as is fully disclosed below, with copies of the documentation of the matters disclosed, that the bidding entity registering to be permitted to participate in the 2002 Annual Sale is not affiliated with any other entity or person registering to bid at the 2002 Annual Sale, in that:

(A) It has no capital, purchase money, or other finances in common with any other bidding entity or person registering to bid at the 2002 Annual Sale;

(B) It shares no common ownership interest or common source of funds with any other bidding entity or person registering to participate at the 2002 Annual Sale;

(C) It has no agreements to purchase or sell any parcels successfully bid on at the 2002 Annual Sale by any other registering bidding entity or person at the 2002 Annual Sale;

(D) It has no agreements to purchase or sell any parcels successfully bid on at the 2002 Annual Sale by any entity or person known to be ineligible to bid at the 2002 Annual Sale;

(c) it does not stand to gain financially pursuant to an agreement with another bidding entity registering for the 2002 Annual Sale concerning parcels to be bid upon or purchased by such other entity at the 2002 Annual Sale.

Explanations, if needed:

Attach additional pages if necessary. Attach exhibits, if any, to application.

Each of the undersigned states under oath or affirmation pursuant to §1-109 of the Illinois Code of Civil Procedure that all of the information set forth in this registration is true, correct, and complete.

Frances L Alexander

Signature of Purchaser

Date: 4/19/04

Signature(s) of ALL Registered Bidder(s):

* 1. Caitlin Siegert

2. Patrick Siegert

3.

4.

OFFICE OF THE COOK COUNTY TREASURER
COOK COUNTY, ILLINOIS
ROOM 212, COUNTY BUILDING
CHICAGO, ILLINOIS 60602

Acknowledgement of Single, Simultaneous Bidder Rule

As in prior tax sales, the Cook County Treasurer will enforce the Single, Simultaneous Related Bidding Entity[1] rule.

This rule provides that one tax buying entity (principal) may not have its/his/her/their actual or apparent agents, employees, or related entities, directly or indirectly register under multiple registrations for the intended or perceived purpose of having more than one person bidding at the tax sale at the same time for the intended or perceived purpose of increasing the principal's likelihood of obtaining a successful bid on a parcel.

This rule does not prevent a single bidder from alternating the identity of the buyer for whom they are bidding at any given time, so long as related bidding entities, or entities perceived to be related, are not bidding at the same time.

The determination of whether registered entities are related, so as to prevent the entities from bidding at the same time, is in the sole and exclusive discretion of the Cook County Treasurer or her designated representatives.

By signing below, I certify under penalty of perjury pursuant to § 1-109 of the Illinois Code of Civil Procedure, that I am a duly authorized agent, officer, or representative for ~~Select Group~~ George Koch Investors LLC *; that I have received and understand the above-stated rules; that at no time during the 2002 Annual Tax Sale shall I, or the entity that I represent, or an entity directly or indirectly related to the above tax buyer, have multiple bidders registered as separate bidding entities, simultaneously bidding at the 2002 Annual Sale.*

I agree that if the tax buying entity that I represent is challenged by the Cook County Treasurer with respect to having related, or allegedly related, entities simultaneously bidding at the Annual Sale, that all such disputes shall have as exclusive venue and jurisdiction in the Circuit Court of Cook County.

Frances L. Alexander — 4/19/04

Authorized Agent for the above Tax Buyer — Date

FRANCES L. ALEXANDER

Printed Name

[1] "Related Bidding Entity" is defined as any individual, corporation, partnership, joint venture, limited liability company, business organization, or other entity that has a shareholder, partner, principal, officer, general partner or other person or entity having an ownership interest in common with, or contractual relationship with, any other registrant in the 2002 Annual Tax Sale.

Maria Pappas
Cook County Treasurer

June 21, 2004

Georgetown Investors LLC
40 Terry Drive
Sugar Grove, IL 60554

Re: Return of Collateral
Buyer Number: *02-00072*

Dear Tax Buyer:

Enclosed is your check that was posted for collateral with our office for the 2002 Annual Tax Sale.

If you have further questions regarding this matter, you may contact the undersigned, (312) 603-5494.

Sincerely,

Gina Quesada
Legal Department

118 North Clark Street • Room 212 • Chicago, Illinois 60602
www.cookcountytreasurer.com

OFFICE OF THE COOK COUNTY TREASURER
COOK COUNTY, ILLINOIS

Request to Reduce Collateral or Cancel Registration: 2002 Annual Tax Sale

I, FRANCES ALEXANDER, a duly authorized agent for the following entity registered as a tax buyer at the 2002 Cook County Annual Tax Sale:

Buyer Name: GEORGETOWN INVESTORS, LLC

Buyer Number: 72; hereby request to:

[ ] Withdraw the letter of credit deposited as collateral & cancel the buyer's registration;

[ ] Withdraw the bond posted as collateral & cancel the buyer's registration;

[X] Withdraw all certified funds deposited as collateral & cancel the buyer's registration;

[ ] Reduce the certified funds deposited by $ _____, and continue to maintain the buyer-s registration.

Checks will be made payable in the name of the registered buyer only. Checks will only be mailed to buyers at their registration address.

I certify that prior to withdrawing or reducing collateral for the above-referenced buyer that said buyer has satisfactorily paid for all tax purchases made by them at the 2002 Annual Sale, and that if subsequent payment is later determined necessary by the Cook County Treasurer for any tax purchase made by the above buyer, that said registered buyer will remain liable for any such unpaid tax purchases.

Printed Name: Frances L. Alexander Signature: Frances L. Alexander

Telephone: (630) 466-1211 FAX: (630) 466-1299

E-Mail: fralex1211@aol.com

Date: 6/8/04

Maria Pappas
Cook County Treasurer

Check Request Form

Please complete the following information for a check request and submit to *ACCOUNTS PAYABLE*. Attach any reports that need to be sent to the payee with the check. *Please note:* If all sections are not completed the check will not be processed and the form will be returned.

Description (refer to list – CIRCLE ONLY ONE):

1 2 3 4 5 6 7 8 9 10 11 12 13

14 15 16 17 18 19 20 (21) 22 23

PIN/Case/Agency Number (if applicable):

Issue Check to:
Payee Name (max-35 characters including spaces):
Georgetown Investors LLC

Address: 40 Terry Drive
Sugar Grove, IL 60554

Payee Telephone Number: (____) _____

Payee Fax Number: (____) _____

Payee E-Mail Address:

Amount: $ 200,000.00

Interest: $ _____

Total: $ 200,000.00

ACCOUNTING USE ONLY:

Home Rule Tax – G/L Distribution Acct: _____

Special Fee – G/L Distribution Acct: _____

Date: 6-21-04

Requested By: EG

Approved By: [signature]

Once Check is received it should be (check ONLY one):

☐ **Forward to:**

☒ **Mail to: (ONLY complete this if the mail to address is different than they payee's address on the left):**

Name: _____

Address: _____

_____

_____

Telephone Number: (____) _____

Fax Number: (____) _____

Cover letter required? (Circle one) (Yes) No

Report/Attachments Required? (Circle one) Yes No
If yes, you must forward the report/attachments with this form.

W-9 Required? (Circle one): Yes No
If yes, attach the completed W-9 or provide the SSN/FEIN# below:

_____

For AP Use Only:

Supplier/Payee#: _____

Batch#: _____

Doc#: _____

Entered By/Date: _____

Descriptions

1. 911
2. ACH Return check to agency
3. Capital Litigation (Other)
4. Capital Litigation-Public Def.
5. Condemnations
6. Condemnations-Tax
7. Counterfeit/Forgery
8. Estate of Heirs (known)
9. Estate of Heirs (unknown)
10. General D
11. DOR (Home Rule) Refunds
12. Indemnity (Refund Dept.)
13. Indemnity-Judge (Legal)
14. Overage
15. Publication Cost
16. Receivership
17. Redemption Fee
18. Senior Citizen
19. Special Assessment
20. Special Fee Refunds
21. Tax Sale Collateral
22. PIN Deletion
23. Suspense

Revised: June 12, 2000

Old Second

Old Second National Bank

37 South River Street
Aurora, IL 60506

THE PURCHASE OF AN INDEMNITY BOND WILL BE REQUIRED BEFORE ANY CASHIER'S CHECK OF THIS BANK WILL BE REPLACED OR REFUNDED IN THE EVENT IT IS LOST, MISPLACED OR STOLEN.

Cashiers Check 35

Date: 4/21/04

Branch: 1012

REMITTER OSNB GEORGETOWN INVESTORS LLC
DDA #707166

PAY TO THE ORDER OF EXACTLY **200,000 AND 00/100 DOLLARS $200,

COOK COUNTY TREASURER

02-072

SIGNATURE HAS A COLORED BACKGROUND • BORDER CONTAINS

⑈0000358055⑈ ⑆071900760⑆ 18⑈

Robert Sieker

From: Ivana Dabizljevic
Sent: Tuesday, July 13, 2004 10:37 AM
To: Martha A. Mills
Cc: Robert Sieker; Brigid Madro
Subject: Tax sale Collateral Check Returned in Mail

We have received a Tax Sale Collateral Check payable to Georgetown Investors LLC (buyer no. 02-00072) for $200,000.00 back in mail as undeliverable.
The mailing address provided by Legal Dept. on the check request was:
40 Terry Drive
Sugar Grove, IL 60554

Please let us know where the checks should be re-mailed.

Thanks,
Ivana Dabizljevic

ILLINOIS

SERVICES PROGRAMS PRESS PUBLICATIONS DEPARTMENTS CONTACT

LLC FILE DETAIL REPORT

	GEORGETOWN INVESTORS LLC		00866393
	GOODSTANDING		03/05/2004
	LLC		Domestic
	02/14/2003		IL
	FRANCIS ALEXANDER		02/14/2003
	40 TERRY DRIVE		40 TERRY DRIVE SUGAR GROVE 60554
	SUGAR GROVE		MBR
	60554		PERPETUAL
	03/05/2004		2004

Return to the Search Screen

BACK TO CYBERDRIVEILLINOIS.COM

Exhibit D

EX. D

Mailings Related To Liens That Sabre Purchased

County Pin #	Volume #	Date (On or About)	Document Mailed
29-18-401-013-0000	211	08/14/2002	22-5
29-18-417-013-0000	211	08/14/2002	22-5
13-01-423-018-0000	317	08/20/2002	22-5
13-01-427-010-0000	317	08/20/2002	22-5
13-01-427-012-0000	317	08/20/2002	22-5
13-02-428-039-0000	318	08/20/2002	22-5
13-06-103-039-0000	323	08/20/2002	22-5
13-07-104-069-0000	324	08/20/2002	22-5
00-00-202-010-9034	429	08/20/2002	22-5
02-02-011-101-0000	429	08/20/2002	22-5
20-20-102-016-0000	429	08/20/2002	22-5
20-20-111-043-0000	429	08/20/2002	22-5
20-20-202-020-0000	429	08/20/2002	22-5
20-20-213-017-0000	429	08/20/2002	22-5
20-20-217-018-0000	429	08/20/2002	22-5
20-20-219-034-0000	429	08/20/2002	22-5
20-20-224-004-0000	429	08/20/2002	22-5
20-20-226-042-0000	429	08/20/2002	22-5
31-34-110-023-0000	180	07/16/2003	22-5
31-35-408-026-0000	180	07/16/2003	22-5
07-07-201-058-0000	187	07/16/2003	22-5
25-22-201-014-0000	290	07/18/2003	22-5
25-22-317-009-0000	291	07/18/2003	22-5
25-27-109-015-0000	293	07/18/2003	22-5
25-27-130-051-0000	293	07/18/2003	22-5
26-05-308-006-0000	295	07/18/2003	22-5
26-06-306-007-0000	296	07/18/2003	22-5
26-06-321-015-0000	296	07/18/2003	22-5
26-06-414-025-0000	297	07/18/2003	22-5
32-21-305-021-0000	015	07/19/2004 07/16/2004 07/19/2004 07/21/2004	22-25 22-10
32-33-322-033-0000	021	07/19/2004 07/19/2004 07/20/2004 07/21/2004	22-25 22-10

EX. D

Mailings Related To Liens That Sabre Purchased

County Pin #	Volume #	Date (On or About)	Document Mailed
32-33-418-026-0000	021	07/19/2004 07/19/2004 07/20/2004 07/21/2004	22-25 22-10
33-18-200-010-0000	022	07/19/2004 07/20/2004 07/21/2004 08/31/2004	22-25 22-10
33-31-112-026-0000	022	07/19/2004 07/19/2004 08/29/2004 08/30/2004 09/10/2004	22-25 22-10
28-17-213-005-0000	031	07/19/2004 07/19/2004 07/20/2004 08/12/2004 08/31/2004	22-25 22-10
30-17-200-003-0000	224	04/27/2005 04/29/2005 05/02/2005	22-25 22-10
28-34-402-022-1092	035	05/24/2005	22-25
32-30-107-059-0000	019	 07/19/2004 07/18/04 07/21/04 07/22/04	 22-25 22-10
25-10-102-029-0000	284	11/04/2004	22-25
25-10-317-029-0000	285	10/1/2004 10/02/2004 10/04/2004	22-25 22-10

Exhibit E

EX. E

Mailings Related to Liens That Regal Purchased

County Pin #	Volume #	Date (On or About)	Document Mailed
29-18-400-026-0000	211	08/14/2002	22-5
29-19-228-046-0000	211	08/14/2002	22-5
13-05-400-025-0000	322	08/20/2002	22-5
13-09-328-062-1010	329	08/20/2002	22-5
20-20-105-011-0000	429	08/20/2002	22-5
20-20-118-010-0000	429	08/20/2002	22-5
20-20-305-041-0000	430	08/20/2002	22-5
20-20-306-022-0000	430	08/20/2002	22-5
20-20-314-025-0000	430	08/20/2002	22-5
20-20-325-025-0000	430	08/20/2002	22-5
20-20-408-036-0000	430	08/20/2002	22-5
31-34-101-032-0000	180	07/16/2003	22-5
31-36-114-041-0000	180	07/16/2003	22-5
31-36-311-029-0000	180	07/16/2003	22-5
31-36-410-030-0000	180	07/16/2003	22-5
15-12-303-028-0000	182	07/16/2003	22-5
15-26-105-026-0000	184	07/16/2003	22-5
25-22-212-031-0000	290	07/18/2003	22-5
25-27-103-010-0000	293	07/18/2003	22-5
25-27-109-020-0000	293	07/18/2003	22-5
25-34-112-021-0000	293	07/18/2003	22-5
26-06-207-024-0000	296	07/18/2003	22-5
26-06-312-004-0000	296	07/18/2003	22-5
26-06-405-022-0000	297	07/18/2003	22-5
28-34-409-012-0000	035	09/22/2004	22-5
06-13-411-006-0000	060	09/22/2004	22-5
18-35-412-025-0000	085	09/09/2004	22-5
10-27-218-032-0000	124	09/22/2004	22-5
02-34-200-038-0000	150	09/22/2004	22-5
31-12-100-075-1016	178	09/22/2004	22-5
29-08-318-020-0000	200	09/22/2004	22-5
30-17-406-010-0000	224	09/22/2004	22-5
20-25-121-007-0000	262	09/27/2004	22-5
13-14-405-039-1016	337	03/27/2004	22-5
32-21-305-021-0000	015	07/19/2004 07/16/2004 07/19/2004 07/21/2004	22-25 22-10

764490 1

EX. E

Mailings Related to Liens That Regal Purchased

County Pin #	Volume #	Date (On or About)	Document Mailed
32-33-322-033-0000	021	07/19/2004	22-25
		07/19/2004 07/20/2004 07/21/2004	22-10
32-33-418-026-0000	021	07/19/2004	22-25
		07/19/2004 07/20/2004 07/21/2004	22-10
33-18-200-010-0000	022	07/19/2004	22-25
		07/20/2004 07/21/2004 08/31/2004	22-10
33-31-112-026-0000	022	07/19/2004	22-25
		07/19/2004 08/29/2004 08/30/2004 09/10/2004	22-10
28-17-213-005-0000	031	07/19/2004	22-25
28-34-402-022-1092	035	05/24/2005	22-25

Exhibit F

EX. F

Mailings Related to Liens That DRN II Purchased

County Pin #	Volume #	Date (On or About)	Document Mailed
20-10-303-013-0000	253	08/14/2002	22-5
20-11-304-015-1013	254	08/14/2002	22-5
20-15-314-016-0000	257	08/14/2002	22-5
20-22-105-007-0000	258	08/14/2002	22-5
20-22-302-031-0000	259	08/14/2002	22-5
20-22-316-009-0000	259	08/14/2002	22-5
20-22-401-031-0000	259	08/14/2002	22-5
20-22-424-017-0000	259	08/14/2002	22-5
20-23-115-003-0000	260	08/14/2002	22-5
20-23-407-016-0000	261	08/14/2002	22-5
20-23-412-044-0000	261	08/14/2002	22-5
31-26-206-009-0000	180	07/16/2003	22-5
31-34-106-003-0000	180	07/16/2003	22-5
31-35-105-023-0000	180	07/16/2003	22-5
31-35-201-036-0000	180	07/16/2003	22-5
31-35-209-012-0000	180	07/16/2003	22-5
31-35-320-010-0000	180	07/16/2003	22-5
25-22-113-061-0000	290	07/18/2003	22-5
25-22-212-043-0000	290	07/18/2003	22-5
25-22-320-012-0000	291	07/18/2003	22-5
25-27-106-001-0000	293	07/18/2003	22-5
25-27-118-051-0000	293	07/18/2003	22-5
25-28-418-008-0000	293	07/18/2003	22-5
32-30-107-059-0000	019	07/19/2004 07/18/04 07/21/04 07/22/04	22-25 22-10
25-10-102-029-0000	284	11/04/2004	22-25
25-10-317-029-0000	285	10/1/2004 10/02/2004 10/04/2004	22-25 22-10

Exhibit G

EX. G

Mailings Related to Liens That Cronus Purchased

County Pin #	Volume #	Date (On or About)	Document Mailed
31-26-100-014-0000	180	07/16/2003	22-5
31-33-102-043-0000	180	07/16/2003	22-5
31-34-403-028-0000	180	07/16/2003	22-5
31-36-109-025-0000	180	07/16/2003	22-5
31-36-200-025-1085	180	07/16/2003	22-5
31-36-200-028-1086	180	07/16/2003	22-5
25-22-201-024-0000	290	07/18/2003	22-5
25-22-317-012-0000	291	07/18/2003	22-5
25-27-104-006-0000	293	07/18/2003	22-5
25-34-111-003-0000	293	07/18/2003	22-5
26-05-313-034-0000	295	07/18/2003	22-5
26-06-104-044-0000	295	07/18/2003	22-5

Exhibit H

EX. H

Mailings Related To Liens That CCJ Purchased

County Pin #	Volume #	Date (On or About)	Document Mailed
31-26-414-009-0000	180	07/16/2003	22-5
31-34-307-006-0000	180	07/16/2003	22-5
31-35-106-024-0000	180	07/16/2003	22-5
01-50-120-601-9000	181	07/16/2003	22-5
07-07-202-057-0000	187	07/16/2003	22-5
07-08-300-020-0000	187	07/16/2003	22-5
25-22-108-015-0000	290	07/18/2003	22-5
25-22-308-027-0000	291	07/18/2003	22-5
25-27-105-019-0000	293	07/18/2003	22-5
25-27-116-014-0000	293	07/18/2003	22-5
25-34-118-020-0000	293	07/18/2003	22-5
26-06-204-028-0000	296	07/18/2003	22-5
26-06-305-061-0000	296	07/18/2003	22-5
26-06-311-047-0000	296	07/18/2003	22-5
28-03-211-061-0000	025	09/21/2004	22-5
12-29-304-012-0000	070	09/21/2004	22-5
10-26-108-023-0000	123	09/21/2004	22-5
31-05-102-011-1009	178	09/21/2004	22-5
03-24-200-133-0000	233	09/24/2004	22-5
21-30-202-015-1015	274	09/24/2004	22-5
13-14-202-001-0000	336	09/24/2004	22-5
19-12-315-016-0000	387	09/24/2004	22-5
20-17-301-007-0000	424	09/24/2004	22-5
16-24-204-011-0000	572	09/28/2004	22-5
30-17-200-003-0000	224	04/27/2005 04/29/2005 05/02/2005	22-25 22-15

Exhibit I

EX. I

Mailings Related to Liens That Georgetown Purchased

County Pin #	Volume #	Date (On or About)	Document Mailed
16-20-302-016-0000	004	09/22/2004	22-5
18-30-306-032-0000	084	09/22/2004	22-5
15-09-210-020-0000	159	09/22/2004	22-5
29-04-314-002-0000	195	09/22/2004	22-5
30-17-212-022-0000	224	09/22/2004	22-5
21-31-212-012-0000	276	09/27/2004	22-5
13-27-326-017-0000	357	09/27/2004	22-5
20-07-204-012-0000	416	09/27/2004	22-5
16-08-215-016-0000	548	09/28/2004	22-5
17-07-323-027-0000	588	09/28/2004	22-5

Exhibit J

EX. J

Mailings Related to Liens That Optimum Purchased

County Pin #	Volume #	Date (On or About)	Document Mailed
31-15-207-011-0000	179	09/22/2004	22-5
30-20-413-053-0000	226	09/22/2004	22-5
13-13-402-033-0000	335	09/27/2004	22-5
19-21-102-034-0000	398	09/27/2004	22-5
20-08-303-037-0000	419	09/27/2004	22-5
14-08-207-017-0000	477	09/28/2004	22-5
13-36-420-015-0000	531	09/28/2004	22-5
17-08-227-007-1012	589	09/28/2004	22-5

Exhibit K

EX. K

Mailings Related to Liens That L.C.C. Purchased

County Pin #	Volume #	Date (On or About)	Document Mailed
32-29-205-014-0000	019	09/22/2004	22-5
33-31-103-030-0000	022	09/22/2004	22-5
28-01-320-005-0000	023	09/22/2004	22-5
28-26-309-014-0000	033	09/22/2004	22-5
28-27-411-002-0000	034	09/22/2004	22-5
16-20-404-037-0000	041	09/27/2004	22-5
16-28-219-019-0000	044	09/27/2004	22-5
06-27-209-015-0000	061	09/27/2004	22-5
18-31-307-034-0000	084	09/28/2004	22-5
12-02-409-006-0000	135	09/28/2004	22-5

Exhibit L

EX. L

Mailings Related to Liens That Jeshay Purchased

County Pin #	Volume #	Date (On or About)	Document Mailed
32-29-205-006-0000	019	09/22/2004	22-5
09-14-111-053-0000	088	09/22/2004	22-5
27-25-313-008-0000	147	09/22/2004	22-5
19-30-405-028-0000	190	09/22/2004	22-5
30-20-409-039-0000	226	09/22/2004	22-5
20-35-222-005-0000	270	09/27/2004	22-5
13-01-121-014-0000	316	09/27/2004	22-5
19-24-404-005-0000	403	09/27/2004	22-5
25-08-102-044-0000	454	09/28/2004	22-5
16-02-318-030-0000	539	09/28/2004	22-5

PETITIONER'S BRIEF

85

(9)

No. 07-210

FILED
FEB 14 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

JOHN BRIDGE, *et al.*,
Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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Chicago, Illinois 60601
(312) 324-1000

Counsel for Petitioners

February 14, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

49P

QUESTION PRESENTED

Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the plaintiff.

PARTIES TO THE PROCEEDING

Petitioners are John Bridge; Barrett Rochman; and Sabre Group, LLC. They were defendants in the district court and appellees in the court of appeals. Other parties in the court of appeals were Plaintiffs-Appellants Phoenix Bond & Indemnity Co. and BCS Services, Inc. and Defendants-Appellees Robert Jensen; Joseph Varan; Jeffrey Bridge; Francis Alexander; Jesse Rochman; Douglas Nash; Cronus Projects, LLC; Gregory Ellis; GJ Venture, LLC; L.C.C. Venture, LLC; Regal One, LLC; Jason Baumbach; Optimum Financial, Inc.; Carpus Investments, LLC; DRN II, Inc.; Jeshay, LLC; Mud Cats Real Estate, LLC; Georgetown Investors, LLC; Corinne Rochman; Christopher Rochman; BRB Investments, LLC; and CCJ Investments, LLC.

The court of appeals dismissed Plaintiff-Appellant Oak Park Investments, Inc. as a party.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There are no amendments to the corporate disclosure statement submitted in the Petition for a Writ of Certiorari in this case.

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In the Supreme Court of the United States

No. 07-210

JOHN BRIDGE, *et al.*,
Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 477 F.3d 928. The opinion of the district court (Pet. App. 9a-21a) is unreported but can be found at 2005 WL 3527232.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2007. On April 17, 2007, the court of appeals denied petitioners' request for rehearing and rehearing *en banc*. Pet. App. 22a-23a. On July 3, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 15, 2007. The petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

> As used in this chapter—(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . .

18 U.S.C. § 1961 (1988).

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1988).

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962(d) (1988).

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

18 U.S.C. § 1964(c) (1995).

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1341 (2002).

STATEMENT OF THE CASE

A. The Cook County Tax Sale

The annual Cook County tax sale is an auction administered by the Cook County Treasurer's Office as part of the Illinois real estate tax system. When property owners fail to pay their real estate taxes, Cook County acquires a tax lien on the property involved. Once a year, the Cook County Treasurer sells these tax liens to the public at the tax sale. The purchaser of each tax lien—called a "Tax Buyer"—must pay the delinquent tax plus any outstanding interest to the County. The property owner then can redeem the tax lien by paying the delinquent tax,

interest, and a predetermined penalty to the Tax Buyer. If the property owner fails to redeem the tax lien within two to three years, the Tax Buyer may commence a judicial proceeding to obtain title to the property. JA 16-17.

At the tax sale, bids are not made in cash amounts, and tax liens are not sold to the highest bidder. Instead, prospective Tax Buyers bid by stating the rate of the predetermined penalty that they will accept from property owners who wish to redeem tax liens. By law, the amount of this penalty can be no lower than 0% and no higher than 18% of the amount of the delinquent taxes. The bidding process is designed to enable property owners to redeem tax liens by paying the lowest possible penalty. Accordingly, the winning bidder at the tax sale is the one who bids the lowest penalty rate. When the bidding process results in one or more ties between prospective Tax Buyers (*i.e.* when two or more low bids for a lien are received at the same penalty rate), the Treasurer determines which of the low bidders will be awarded the affected liens. JA 17-18.[1]

To be eligible to participate in a tax sale, prospective Tax Buyers must register with the County Treasurer's office. The registration process requires submission of an application and a sworn affidavit

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[1] A Tax Buyer who has purchased a tax lien also can pay real estate taxes that become due after the tax sale, which are called "subsequent taxes." Unlike delinquent taxes due at the time of the tax sale, the penalty rate for subsequent taxes is not set at auction. Rather, this penalty is set by statute at a rate of 12%. To redeem a tax lien when a Tax Buyer has paid subsequent taxes, a property owner must pay the Tax Buyer both the delinquent taxes plus the penalty set at auction and the subsequent taxes plus the statutory penalty. JA 18.

that, among other things, affirms the Tax Buyer's compliance with the Single Simultaneous Bidder Rule (the "SSB Rule").[2] The SSB Rule is not prescribed by statute but is an administrative rule established by the Treasurer. It generally prohibits related bidding entities from simultaneously participating in the bidding on any individual lien. As set forth in the "Acknowledgement of Single Simultaneous Bidder Rule" form distributed by the County Treasurer, the Rule

> provides that one tax buying entity (principal) may not have its/his/her/their actual or apparent agents, employees, or related entities, directly or indirectly register under multiple registrations for the intended or perceived purpose of having more than one person bidding at the tax sale at the same time for the intended or perceived purpose of increasing the principal's likelihood of obtaining a successful bid on a parcel.
>
> This rule does not prevent a single bidder from alternating the identity of the buyer for whom they are bidding at any given time, so long as related bidding entities, or entities perceived to be related, are not bidding at the same time.

JA 67 (emphasis in original).

The Acknowledgement form is signed by an authorized agent for the Tax Buyer. The Acknowledgement form further states that "[t]he determination of whether registered entities are related, so as to prevent the entities from bidding at the same time, is in the sole and exclusive discretion of the

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[2] Plaintiffs do not allege that these applications were mailed to the County Treasurer

Cook County Treasurer or her designated representatives." JA 67 (emphasis in original). By signing the Acknowledgement form, each Tax Buyer agrees that, "if the tax buying entity that [the Tax Buyer] represent[s] is challenged by the Cook County Treasurer with respect to having related, or allegedly related, entities simultaneously bidding at the Annual Sale, that all such disputes shall have as exclusive venue and jurisdiction in the Circuit Court of Cook County." *Id.*

In recent years, the Cook County tax sales have become very competitive. Since 2000, the typical winning bid submitted by Tax Buyers has been a penalty rate of 0%. As a result, Tax Buyers generally do not make a profit when property owners timely redeem tax liens. Rather, a profit ordinarily is realized only when one of two things occurs: the Tax Buyer pays subsequent taxes and collects the 12% statutory penalty from the property owner (*see* note 1); or the property owner fails to timely redeem a tax lien and the Tax Buyer obtains title to the property, which generally can be sold for an amount significantly greater than the amount paid for the tax lien. JA 18-19.

After a Tax Buyer purchases a tax lien, a notice must be provided to the property owner (the last assessee of record, to be technically precise), informing the property owner that delinquent taxes, interest, and any penalty must be paid to the County (which in turn remits it to the Tax Buyer). The Tax Buyer must prepare this notice (the "22-5 Notice"; so named because of the section of the Illinois Property Tax Code that requires it, 35 ILCS 200/22-5) and provide it to the County, and the County sends it by certified mail to the property owner. JA 19. If the

property owner fails to redeem the tax lien and the Tax Buyer then files a Petition for Tax Deed to seek to obtain title to the property, a second notice must be provided to the property owner (the "22-10 Notice"). Like the 22-5 Notice, the 22-10 Notice must be prepared by the Tax Buyer and submitted to the County. The County Sheriff then serves the 22-10 Notice on the owners and occupants of the property and on any other interested parties. If any such persons cannot be served personally within the County, the Sheriff must serve the 22-10 Notice by certified mail. JA 19-20. Finally, an additional notice must be provided to the property owners and occupants during the prescribed notice—serving period, advising that the Tax Buyer has filed a judicial action to obtain title to the property and when the redemption period will expire (the "22-25 Notice"). Like the other notices, the 22-25 Notice must be prepared by the Tax Buyer and provided to the County. The County then sends the notice by certified mail to the owners and occupants of the property. JA 20. *See* 35 ILCS 200/22-15 through 200/22-25.

B. Proceedings In The District Court And The Court Of Appeals

On July 15, 2005, Phoenix Bond & Indemnity Co. and BCS Services, Inc. ("Plaintiffs") filed this action against petitioners and more than twenty other defendants in the United States District Court for the Northern District of Illinois. Pet. App. 9a. Plaintiffs, both of which were Tax Buyers in one or more Cook County tax sales, alleged that defendants, also Tax Buyers in one or more of those tax sales, had participated in the conduct of the affairs of an enterprise through a pattern of racketeering activity,

and had conspired to do so, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) and (d). JA 47-52. The "racketeering activity" that Plaintiffs alleged consisted of alleged mail fraud, in violation of 18 U.S.C. § 1341.

In particular, Plaintiffs alleged that defendants violated the SSB Rule by agreeing to transfer tax liens they purchased to a single entity. Plaintiffs did not explain why such an agreement, without more, allegedly would violate the SSB Rule. Although Plaintiffs did not identify any tax lien obtained by any defendant on which at least one Plaintiff and two or more defendants bid, Plaintiffs claimed that defendants improperly obtained more liens than they would have obtained if they had complied with the SSB Rule. JA 22-24.

Plaintiffs further alleged that defendants' putative scheme to obtain additional liens necessarily involved certain mailings, which allegedly established the predicate acts of mail fraud and thus formed the pattern of racketeering activity necessary for a RICO claim. These mailings were the routine 22-5, 22-10, and 22-25 Notices that were sent by the County to persons with an interest in the property. JA 41-47, 97-131. Plaintiffs did not allege that any of these mailings included any misrepresentations or that any of the mailings were directed to or received by Plaintiffs. Rather, the only misrepresentations alleged by Plaintiffs were defendants' affirmations to the Cook County Treasurer's Office as part of the Tax Buyer registration process regarding defendants' compliance with the SSB Rule. JA 23. Plaintiffs did not allege that any of these affirmations were

directed to or received by Plaintiffs, or that they were mailed to the County Treasurer.

On motions to dismiss filed by all defendants, the district court held that Plaintiffs lacked standing to bring their RICO claims. The court therefore dismissed those claims with prejudice. Pet. App. 20a. The court explained: "The plaintiffs were not the recipients of either the defendants' alleged misrepresentations that they were complying with the Single, Simultaneous Bidder Rule, nor were they sent the mailings that completed the purchase of the tax lien. The misrepresentations were made to the Treasurer and the mailings were sent to the property owners." *Id.* at 18a.[3]

The court of appeals reversed. As an initial matter, the court of appeals concluded that "[s]tanding is not a problem in this suit." Pet. App. 3a. Nevertheless, the court acknowledged that "[i]njury in fact is not sufficient under RICO" and that "the plaintiff also must establish that its injury was proximately caused by the defendants' scheme," citing this Court's decisions in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). *Id.* at 4a. Proceeding to the proximate cause analysis, the court of appeals concluded that there is a split in the circuits regarding whether plaintiffs asserting a RICO claim based on mail fraud can recover even though they never received any false statements, or whether

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[3] Plaintiffs also alleged a claim under state law for tortious interference with prospective economic advantage. The district court declined to exercise supplemental jurisdiction over Plaintiffs' state law claim of tortious interference with prospective economic advantage and dismissed that claim without prejudice. Pet. App. 20a.

"plaintiffs must show that they 'in fact relied upon [the defendant's] material misrepresentation'" (quoting *Vandenbroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000)). Relying on the nature of the federal mail fraud crime, and citing the court's own previous decisions in *In re EDC, Inc.*, 930 F.2d 1275, 1279-80 (7th Cir. 1991), and *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995), the court of appeals ruled that a plaintiff can assert a RICO claim based on mail fraud even if the defendant has made no misrepresentation to the plaintiff and even if the plaintiff did not rely on any misrepresentation by the defendant. The court therefore reversed the district court's dismissal and remanded for further proceedings. Pet. App. 7a-8a.

After denying a petition for rehearing, the court of appeals declined to stay its mandate pending disposition of a request for review in this Court. JA 9.

C. Subsequent Proceedings In The District Court

After remand, Plaintiffs twice amended their complaint, pleading additional facts about the alleged relationship among certain defendants, and naming five so-called third-party co-conspirators. The currently operative pleading, Plaintiffs' *Corrected* Second Amended Complaint, does not alter the key allegations in the original complaint regarding the representations made by defendants to the Cook County Treasurer or the notices prepared by defendants and then mailed to interested persons by Cook County.

Although the district court previously had informed Plaintiffs of other pleading deficiencies in the original

complaint that did not form the basis for the district court's dismissal (*see* Pet. App. 19a-20a), Plaintiffs did not rectify these problems on remand. In particular, Plaintiffs still did "not identify any properties on which the defendants simultaneously bid; and on which the plaintiff also bid and lost." *Id.* at 20a.

Defendants have moved to dismiss the *Corrected* Second Amended Complaint on several grounds, including that, as a condition of participating in the tax sales, all Tax Buyers agreed that only the County Treasurer can determine whether any Tax Buyer failed to comply with the SSB Rule and Plaintiffs have not alleged that they have asked the County Treasurer to make, nor has she made, any such determination regarding defendants. Defendants have argued further that Plaintiffs have not cured the pleading deficiencies identified by the district court, have not pled fraud with the necessary particularity under Fed. R. Civ. P. 9(b), and have not pled essential elements of their state law claim for tortious interference with prospective economic advantage. The motion to dismiss the *Corrected* Second Amended Complaint remains pending in the district court.

After this Court's grant of certiorari, the district court, in an order entered on February 1, 2008, stayed further proceedings pending this Court's decision.

SUMMARY OF ARGUMENT

I. Congress provided a private right of action for damages to "[a]ny person injured in his business or property by reason of" a violation of the RICO statute. 18 U.S.C. § 1964(c). In so doing, Congress explicitly required a civil RICO plaintiff to establish

that he suffered injury as a result of a RICO violation.

When basing a civil RICO claim on fraud, it is not sufficient for a plaintiff to show that some violation of a federal fraud statute has occurred. Rather, the plaintiff must show, like any other fraud plaintiff, that the plaintiff itself was defrauded. There is no indication that Congress, in authorizing a civil RICO action based on fraud, intended to permit such actions by persons who were not themselves defrauded. Congress imposed *additional* requirements of pleading and proof (*e.g.*, participation in the conduct of an enterprise, through a pattern of racketeering activity), but it did not authorize an action predicated on fraud without a showing that the plaintiff himself was defrauded.

In determining what a civil RICO plaintiff alleging fraud must show, the common law of fraud provides appropriate guidance. This Court has acknowledged that when Congress uses terms with a well-settled meaning at common law, it is presumed that the common-law meaning is incorporated into the statutory text. *Neder v. United States*, 527 U.S. 1, 21 (1999). The long-standing common-law principles of fraud require that a plaintiff may recover for fraud only if the plaintiff relied on a misrepresentation made to the plaintiff by the defendant. A plaintiff cannot have been defrauded unless he has relied on such a misrepresentation.

Here, Plaintiffs did not, and cannot, allege that they relied on any alleged misrepresentations. According to the allegations of the Complaint, only the County Treasurer, not Plaintiffs, received any misrepresentations, and only the County Treasurer, not Plaintiffs, could have relied on any such

misrepresentations. As a result, Plaintiffs' civil RICO claim fails. That does not mean that Plaintiffs may not be able to plead some other common-law tort. Indeed, Plaintiffs also alleged a state law claim for tortious interference with prospective economic advantage. But Plaintiffs cannot pursue a civil RICO claim based on fraud because no misrepresentations were made to them, they did not rely on any misrepresentations, they were not defrauded, and they did not suffer any injury as a result of a fraud perpetrated against them.

II. The proximate cause requirement inherent in the "by reason of" language of § 1964(c) also demands that a civil RICO plaintiff asserting a claim based on fraud establish his reliance on a misrepresentation by the defendant. This Court held in *Holmes* that the "by reason of" language, borrowed by Congress from the federal antitrust laws, necessarily incorporated a requirement that a civil RICO plaintiff establish a sufficient causal connection between his injury and the alleged RICO violation. In the context of a civil RICO claim predicated on fraud, that required causal link demands a showing that the plaintiff relied on an alleged misrepresentation made to the plaintiff by the defendant. Otherwise, the causal relationship between the alleged injury and the alleged fraud is too attenuated.

Applying the common-law meaning of proximate cause to this case, Plaintiffs are unable to meet the proximate cause requirement because they cannot plead or prove that they relied on any alleged misrepresentation. It is undisputed that Plaintiffs did not even receive any alleged misrepresentation, much less rely on one. Plaintiffs therefore cannot

satisfy the proximate cause requirement for a civil RICO claim based on fraud.

III. Without a reliance requirement for claims based on fraud, civil RICO will be expanded far beyond what Congress intended. Unlike the government, civil RICO plaintiffs do not exercise prosecutorial discretion when deciding to bring a case under Section 1964(c). Instead, the attraction of treble damages and attorneys' fees are a major incentive for civil plaintiffs to devise some way to bring their case under civil RICO. Without requiring plaintiffs to establish the traditional requirements of common-law fraud, there will be an expansion and over-federalization of fraud cases under civil RICO, even where such claims could not survive at common law in state court.

The courts of appeals have recognized the danger of permitting civil RICO cases based on fraud in the absence of a reliance requirement. The Fifth Circuit cautioned that without reliance, fraud could be applied to "garden variety products liability cases" through civil RICO, even when traditional state law would not permit such a fraud claim to survive. *Summit Props., Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000). Products liability cases are not the only ones that will be swept within the reach of civil RICO if plaintiffs are not required to establish reliance on alleged misrepresentations. Other courts of appeals have rejected the encroachment of civil RICO claims into cases involving, for example, warranties (*Appletree Square I, Ltd. P'ship v. W.R. Grace & Co.*, 29 F.3d 1283 (8th Cir. 1994)); stock purchases (*Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991)); and workers' compensation

(*Brown v. Cassens Transport Co.*, 492 F.3d 640 (6th Cir. 2007)).

Without a reliance requirement, many such cases will be brought improperly under civil RICO, even where the plaintiffs may have an adequate, alternative claim under state tort law. Particularly in these circumstances, there is no basis for permitting a plaintiff to pursue treble damages and attorneys' fees through a civil RICO claim based on fraud, when the common-law requirements of fraud cannot be satisfied.

ARGUMENT

The court of appeals erroneously held that a plaintiff who asserts a civil RICO claim predicated on mail fraud need not show that he relied on, or even that he ever received, any misrepresentation made by the defendant. In Section I, we show that the court of appeals' decision cannot be reconciled with this Court's precedent requiring that well-settled common-law principles be applied when construing the civil action provision of RICO. When a civil RICO claim is predicated on allegations of fraud, these common-law principles require the plaintiff to show that he relied on a misrepresentation made to him by the defendant. Congress made treble damages and attorneys' fees available for RICO plaintiffs who could establish injury to their business or property by reason of the conduct of an enterprise through a pattern of racketeering activity. But Congress never said, and did not intend, that by invoking RICO in a claim based on fraud, plaintiffs could avoid the reliance requirement that the common law has applied to fraud claims for more than a century.

Moreover, even if, as Plaintiffs contend, proximate cause is the only relevant limitation on civil RICO claims, proximate cause traditionally has incorporated a reliance element for claims based on fraud. As we show in Section II, therefore, the decision below conflicts with this Court's precedent holding that the "by reason of" requirement in RICO's civil action provision, 18 U.S.C. § 1964(c), incorporates common-law proximate cause principles. For civil RICO claims based on fraud, the proximate cause requirement cannot be met absent a plaintiff's reliance on a defendant's misrepresentation to the plaintiff. As we further show in Section III, public policy considerations strongly support the conclusion that civil RICO plaintiffs alleging fraud should not be able to prevail without showing that they relied on a defendant's alleged misrepresentation.

I. UNDER GOVERNING COMMON-LAW PRINCIPLES, A PLAINTIFF WHO ASSERTS A CIVIL RICO CLAIM PREDICATED ON MAIL FRAUD MUST ESTABLISH THAT HE RELIED ON A MISREPRESENTATION MADE TO HIM BY THE DEFENDANT.

A. The Applicable Statutes—The Mail Fraud Statute And § 1964(c) of RICO—Should Be Construed In Accordance With Well-Established Common-Law Principles.

The RICO statute authorizes civil suits against persons who participate in the conduct of an enterprise through a pattern of "racketeering activity." "Racketeering activity," in turn, is defined in the statute to include more than one hundred predicate acts, one of which is any act "indictable under . . .

Title 18, United States Code . . . section 1341 (relating to mail fraud) . . . ." 18 U.S.C. § 1961(l).

In determining whether a plaintiff has adequately pled or proven a civil RICO claim, the first step is to determine whether a predicate act has been pled or proven. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 400 (2003). Failure to adequately plead or prove a predicate act is fatal to a civil RICO claim. *Id.* at 411.

In *Scheidler*, the respondents brought civil RICO claims predicated on extortion in violation of federal and state laws, including the Hobbs Act, 18 U.S.C. § 1951. On appeal from a jury verdict finding that the petitioners violated the civil provisions of RICO and a judgment awarding damages and a permanent injunction, the Seventh Circuit affirmed in relevant part. This Court granted certiorari and reversed. The Court "first address[ed] the question whether petitioners' actions constituted extortion in violation of the Hobbs Act." 537 U.S. at 400. After "conclud[ing] that there was no basis upon which to find that [petitioners] committed extortion under the Hobbs Act," *id.* at 409, this Court next considered whether the petitioners' actions constituted extortion under any of the other laws at issue. *Id.* at 409-10. Concluding that they did not, this Court held that, "[b]ecause all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed." *Id.* at 411. Thus, the failure to adequately plead a predicate act requires dismissal of a civil RICO claim.

Simply pleading a violation of the criminal mail fraud statute is not sufficient to establish a predicate act in a civil RICO case. As this Court explained in

Neder, *criminal* prosecutions under the mail fraud statute require proof of neither reliance nor damages because the mail fraud statute prohibits the "scheme to defraud, rather than the completed fraud." 527 U.S. at 25; *see also Pelletier v. Zweifel*, 921 F.2d at 1498 ("A scheme to defraud need not be carried out to constitute a violation of the mail and wire fraud statutes. These statutes punish unexecuted, as well as executed, schemes."); *United States v. Stewart*, 872 F.2d 957, 960 (10th Cir. 1989) ("It is well established . . . that an offense under § 1341 [the mail fraud statute] . . . does not require the successful completion of the scheme to defraud."). But such limited allegations and proof cannot satisfy a plaintiff's burden in a *civil* case: "Civilly of course the [mail fraud statute] would fail without proof of damage, but that has no application to criminal liability." *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932) (L. Hand, J.), quoted in *Neder*, 527 U.S. at 25; *see also Summit Props.*, 214 F.3d at 559 ("the government can punish unsuccessful schemes to defraud because the underlying mail fraud violation does not require reliance, but a civil plaintiff 'faces an additional hurdle' and must show an injury caused 'by reason of' the violation.").

Consequently, the fact that reliance by the plaintiff is not a required element of a *criminal* violation of the mail fraud statute does not end the inquiry into whether reliance by the plaintiff is a required element of a *civil* RICO claim predicated on mail fraud. Rather, to determine whether reliance by the plaintiff is required in a *civil* RICO case predicated on mail fraud, a court must "first look to the text of the statutes at issue to discern whether they require [such] a showing . . . ." *Neder*, 527 U.S. at 20 (citing *United States v. Wells*, 519 U.S. 482 (1997)).

The statutes at issue here are the mail fraud statute, 18 U.S.C. § 1341, and the civil action provision of the RICO statute, 18 U.S.C. § 1964 (c). The word "reliance" does not appear in these statutory provisions, but that is not dispositive. As this Court has held:

> That does not end our inquiry, . . . because in interpreting statutory language there is a necessary second step. It is a well-established rule of construction that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."

Neder, 527 U.S. at 21 (citation omitted); *see also Scheidler*, 537 U.S. at 402 ("Absent contrary direction from Congress, we begin our interpretation of statutory language with the general presumption that a statutory term has its common-law meaning.").

This Court has held that the "common-law meaning" rule must be applied when interpreting the mail fraud statute. In *Neder*, the issue was whether materiality is an element of a "scheme or artiface to defraud" under the federal mail fraud (18 U.S.C. § 1341), wire fraud (§ 1343), and bank fraud (§ 1344) statutes. 527 U.S. at 20. As a threshold matter, this Court concluded that, "based solely on a natural reading of the full text, materiality would not be an element of the fraud statutes." *Id.* at 21 (citation omitted). After reviewing relevant common-law authorities, however, this Court concluded that, at the time the mail fraud statute was enacted, "the well-settled meaning of 'fraud' required a misrepresentation or concealment of *material* fact." *Id.* at 22

(emphasis in original). On this basis, the Court reasoned that materiality should be required absent some persuasive evidence that Congress intended to exclude any materiality element:

> Thus, under the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses, we cannot infer from the absence of an express reference to materiality that Congress intended to drop that element from the fraud statutes. On the contrary, we must *presume* that Congress intended to incorporate materiality "unless the statute otherwise dictates."

Id. at 23 (citation omitted) (emphasis in original). Following this reasoning, the Court held that materiality is an element of the federal mail fraud, wire fraud, and bank fraud statutes. *Id.* at 25.

This Court has also held that the common-law meaning rule must be applied when interpreting the RICO statute. In *Beck v. Prupis,* this Court ruled that a plaintiff may not bring a civil RICO conspiracy claim under § 1962(d) "for injuries caused by an overt act that is not an act of racketeering or otherwise unlawful under the statute." 529 U.S. 494, 507 (2000). In *Beck*, the plaintiff filed a civil RICO suit against his former employers for dismissing him because he alerted regulators that the employers were engaged in racketeering activities. *Id.* at 498. The plaintiff claimed that his injury was "proximately caused by an overt act—namely, the termination of his employment—done in furtherance of respondents' conspiracy, and that §1964(c) therefore provided a cause of action." *Id.* at 499. But the Court rejected this argument, relying on common-law principles of *civil* conspiracy. Specifically, the Court

stated that "[b]y the time of RICO's enactment in 1970, it was widely accepted that a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious." *Id.* at 501. The Court rejected the plaintiff's argument that the interpretation of the elements for a civil RICO conspiracy claim should be based solely on criminal law principles:

> We have turned to the common law of criminal conspiracy to define what constitutes a violation of § 1962(d), a mere violation being all that is necessary for criminal liability. This case, however, does not present simply the question of what constitutes a violation of § 1962(d), but rather the *meaning of a civil cause of action for private injury* by reason of such a violation. In other words, our task is to interpret §§ 1964(c) and 1962(d) in conjunction, rather than § 1962(d) standing alone. The obvious source in the common law for the combined meaning of these provisions is the law of civil conspiracy.

Id. at 501 n.6 (emphasis added) (citation omitted).

Likewise, this case does not present simply the question of what constitutes a violation of the mail fraud statute sufficient to establish criminal liability, but rather the meaning of a civil cause of action under RICO for private injury by reason of such a violation. In other words, the task here is to interpret §1341 in conjunction with § 1964(c). Just as in *Beck*, "[t]he obvious source in the common law for the combined meaning of these provisions [was] the law of civil conspiracy," here the obvious source in the common law is the law of civil fraud. *Id.* The Court therefore should look to the well-settled common-law elements of fraud at the time RICO was enacted to

determine whether a showing of reliance is required for a civil RICO claim predicated on mail fraud.

When interpretation of a federal statute requires reference to common-law principles, this Court looks to "the general common law of torts, [*i.e.*,] the dominant consensus of common-law jurisdictions, rather than the law of any particular State." *Field v. Mans*, 516 U.S. 59, 71 n.9 (1995). In this regard, this Court has said that "the most widely accepted distillation of the common law of torts" is the Restatement (Second) of Torts. *Id.* at 70. The Court also has looked on occasion to various editions of Prosser's Law of Torts. *Id.* at 71-72; *see also Beck*, 529 U.S. at 501 (relying on Restatement (Second) of Torts (1977) and W. Prosser, Law of Torts (4th ed. 1971) to determine the common-law meaning of terms used in the RICO statute, which was enacted in 1970).

B. Under Well-Established Common-Law Principles, The Mail Fraud Statute And § 1964(c) Of RICO Should Be Construed To Require That A Plaintiff Who Asserts A Civil RICO Claim Predicated On Fraud Establish That He Relied On A Misrepresentation Made to Him By The Defendant.

When the federal mail fraud statute was enacted in 1872, "actionable 'fraud' had a well-settled meaning at common law." *Neder*, 527 U.S. at 22. By the time RICO was enacted in 1970, it was at least as well-settled that a civil plaintiff may recover for fraud "if, but only if, he relies on the misrepresentation in acting or refraining from action and his reliance is justifiable." Restatement (Second) of Torts, § 537 (1977); *see also* W. Keeton, D. Dobbs, R. Keeton and

P. Owen, *Prosser and Keeton on Law of Torts* § 108 (5th ed. 1984) ("*Prosser & Keeton*") ("Not only must there be reliance but the reliance must be justifiable under the circumstances."); *Capiccioni v. Brennan Naperville, Inc.*, 791 N.E.2d 553, 558 (Ill. App. Ct. 2003) ("The elements of common-law fraud [include] plaintiff's reliance upon the truth of the statement.").[4]

Only "the *recipient* of a fraudulent misrepresentation" may recover under common-law fraud. Restatement (Second) of Torts § 537; *see also Wright v. Peabody Coal Co.*, 8 N.E.2d 68, 70 (Ill. App. Ct. 1937) ("The essential elements of an action on the case for fraud and deceit are that the defendant made representations that were false; that they were known by the defendant to be false and made to deceive *the plaintiff*; that the plaintiff believed the representations; that the plaintiff reasonably relied on said representations, and acted thereon to his damage or injury.") (emphasis added)). Plaintiffs cannot satisfy the reliance requirement by claiming they relied on the "integrity of the allocation process used by the County," Opp. 29, a claim they never alleged in their complaint. Such a claim does not satisfy the requirement of common-law fraud that the plaintiff must be the recipient of the fraudulent misrepresentation. "The maker of a fraudulent misrepresentation in a business transaction is liable for

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[4] Reliance on a misrepresentation is not justifiable where the plaintiff "knows that it is false or its falsity is obvious to him." Restatement (Second) of Torts § 541. At a minimum, therefore, Plaintiffs could not ever claim that they justifiably relied on any of the alleged misrepresentations by the defendants at any time after they filed their original complaint on July 15, 2005. Yet, in their *Corrected* Second Amended Complaint, Plaintiffs appear to be seeking to recover even with respect to tax sales that occurred after the original complaint was filed.

pecuniary loss caused to *its recipient* by his reliance upon the truth of the matter misrepresented." Restatement (First) of Torts § 546 (1938) (emphasis added). An expectation that others will generally comply with the law is not a representation made by anyone, nor can it be considered a representation that is made to the plaintiff. Plaintiffs did not and cannot allege that they received any misrepresentation and, therefore, they are unable to establish the requisite reliance on a misrepresentation to recover under common-law fraud.

For more than a century, courts have recognized reliance by the plaintiff to be a necessary element of a common-law fraud claim. "The essential constituents of [an action for fraud and deceit by means of false pretenses] are a false representation . . . which came to the knowledge of the *plaintiff* and *in reliance upon* which he, in good faith acted, and thus suffered the injury of which he complains. *The absence of any one of these particulars is fatal to a recovery.*" *Brackett v. Griswold*, 112 N.Y. 454, 455 (N.Y. 1889) (emphasis added). Accordingly, reliance by the plaintiff on a misrepresentation by the defendant was a well-established element of a common-law fraud claim long before RICO was enacted. It follows under this Court's precedents that reliance by the plaintiff is also a necessary element of a civil RICO claim predicated on a violation of a federal fraud statute, such as the mail fraud provision in 18 U.S.C. § 1341.

II. RELIANCE BY THE PLAINTIFF ON THE DEFENDANT'S MISREPRESENTATION IS ALSO NECESSARY TO SATISFY THE PROXIMATE CAUSE REQUIREMENT OF A CIVIL RICO CLAIM PREDICATED ON MAIL FRAUD.

A. The "by reason of" Language Of § 1964(c) Requires A Civil RICO Plaintiff To Establish That His Injuries Were Proximately Caused by a RICO Violation.

RICO's civil action provision, 18 U.S.C. § 1964(c), provides a cause of action to a plaintiff injured in his business or property "by reason of" a violation of the RICO statute. In *Holmes*, this Court construed the words "by reason of" to impose the requirement that a plaintiff prove a proximate cause relationship between his claimed injury and a RICO violation. 503 U.S. at 265-68. The decision in *Holmes* was grounded on the fact that "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act, which reads in relevant part that 'any person who should be injured in his business or property *by reason of* anything forbidden in the antitrust laws may sue therefor. . . .'" *Id.* at 267 (citation omitted) (ellipsis in original) (emphasis added).

Holmes principally relied on this Court's earlier decision in *Associated General Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 579 (1983), where the Court explained that Congress had enacted § 4 in 1914 by borrowing language from § 7 of the Sherman Act, which was enacted twenty-four years earlier. *Holmes*, 503 U.S. at 267. Because the lower federal courts already had read § 7 to incorporate common

law principles of proximate causation before § 4 was passed, the *Associated General Contractors* Court concluded "that Congressional use of the § 7 language in § 4 presumably carried the intention to adopt the 'judicial gloss that avoided a simple literal interpretation.'" *Id.* at 268 (quoting *Associated Gen. Contractors*, 459 U.S. at 534). In *Holmes*, this Court concluded that "[this] reasoning applies just as readily to § 1964(c)." *Id.* As the Court explained:

> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Id. (citations omitted). The Court therefore held that plaintiffs must establish proximate cause to recover under civil RICO. *Id.*

B. Established Common-Law Principles Govern Whether Or Not A Civil RICO Plaintiff Is Able To Establish Proximate Cause.

Although *Holmes* decided that § 1964(c)'s "by reason of" language imposes a proximate cause requirement on civil RICO claims, this Court did not establish any rigid framework for determining whether the proximate cause requirement is satisfied. This is because, as the Court observed, "'the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case.'" *Holmes*, 503 U.S. at 274 n.20 (quoting *Associated Gen. Con-*

tractors, 459 U.S. at 536). The Court did, however, provide the following general guidelines for addressing this issue: "Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" *Holmes*, 503 U.S. at 268 (quoting *Prosser and Keeton* § 41, at 264). Consequently, as this Court further explained, general common-law proximate cause principles must be consulted to determine whether the proximate cause requirement is satisfied. *Id.* at 268-69 (citing 1 J. Sutherland, *Law of Damages* 55-56 (1882)).

The directive of *Holmes* that general common-law principles be consulted to determine whether a civil RICO plaintiff can establish proximate cause is buttressed by this Court's decision in *Beck*. In *Beck*, this Court considered whether a Section 1964(c) plaintiff asserting an injury based on a violation of the conspiracy provision in Section 1962(d) has a cause of action when the overt act alleged to have proximately caused the injury is not itself a racketeering act. In holding that the plaintiff did not have a cause of action, the Court "turn[ed] to the well-established common law of civil conspiracy," *id.* at 500, explaining that the law of civil conspiracy was "[t]he obvious source in the common law" for guidance in interpreting the relevant provisions of RICO. *Id.* at 501 n.6. Relying on these common-law principles, the Court concluded:

> As at common law, a civil conspiracy plaintiff cannot bring suit under RICO based on injury caused by *any* act in furtherance of a conspiracy that might have caused the plaintiff injury.

> Rather, consistency with the common law requires that a RICO conspiracy plaintiff allege injury from an act that is analogous to an "ac[t] of a tortious character," *see* 4 Restatement (Second) of Torts § 876, Comment *b*, meaning an act that is independently wrongful under RICO.

Id. at 505-06 (emphasis in original).

Here, the common-law dealing with causation is the "obvious source" to consult for guidance in determining whether proximate cause requires, in the context of a RICO claim based on mail fraud, a showing that the plaintiff relied on the defendant's misrepresentation. Under well-settled common-law principles, proximate cause is established for fraud claims only where the plaintiff can demonstrate that he relied on the misrepresentation: "A fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction *in reliance upon it* if, but only if, the loss might reasonably be expected to result from the reliance." Restatement (Second) of Torts § 548A (emphasis added). Put another way, the causation element of common-law fraud is "a matter of the recipient's reliance in fact upon the misrepresentation in taking some action or in refraining from it." *Id.* at Comment *a*. It necessarily follows that a plaintiff asserting a civil RICO claim predicated on mail fraud cannot satisfy the proximate cause requirement unless he can establish that his injuries resulted from his reliance on the defendant's fraudulent misrepresentation. Indeed, as we show below, the majority of federal courts of appeals to consider this issue have so held.

C. A Majority Of The Courts Of Appeals That Have Considered The Issue Have Held That Reliance By The Plaintiff On A Misrepresentation By The Defendant Is A Required Element Of A Civil RICO Claim Predicated On Mail Fraud.

In *Summit Properties*, the Fifth Circuit affirmed the dismissal of the plaintiffs' civil RICO claims predicated on mail and wire fraud because the plaintiffs were unable to establish their reliance on the alleged misrepresentations of the defendants. 214 F.3d at 562. The plaintiffs in *Summit Properties* alleged that the defendants, manufacturers and marketers of polybutylene plumbing systems, engaged in a conspiracy to defraud by directing a fraudulent marketing plan at building code approval officials, members of the building industry, and others. It was undisputed, however, that none of the plaintiffs had detrimentally relied on the allegedly false representations that served as the basis for their RICO claims. *Id.* at 558. In deciding the case, the Fifth Circuit first observed that: "[m]ost other circuits . . . require a showing of detrimental reliance by the plaintiff, which is consistent with *Holmes'* admonition that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiff's injuries and the underlying RICO violation." *Id.* at 560 (citations omitted). The Fifth Circuit then held that requiring a plaintiff to establish his reliance on the misrepresentation is consistent with *Holmes*'s requirement of proximate cause for civil RICO cases predicated on mail fraud. *Id.*

In *Chisolm v. Transouth Financial Corp.*, 95 F.3d 331 (4th Cir. 1996), the Fourth Circuit vacated the district court's dismissal of the plaintiffs' RICO claims for failure to allege reliance and remanded the case with instructions to allow the plaintiffs an opportunity to amend their complaint. *Id.* at 338. In their original complaint, the plaintiffs alleged that the defendants had engaged in a fraudulent vehicle repossession scheme that involved the mailing of notices to the plaintiffs that misrepresented the nature of the vehicle repossession proceedings that were underway. But the plaintiffs did not allege that they had relied on these mailings. *Id.* While remanding the case to permit the plaintiffs to amend their complaint to allege reliance if they could, the court admonished that "in civil RICO fraud actions . . . where fraud is alleged as a proximate cause of the injury, the fraud must be a 'classic' one. In other words, the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation." *Id.* at 337.[5]

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[5] The Seventh Circuit in this case misread an earlier Fourth Circuit case, *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994). In its opinion, the Seventh Circuit, citing *Mid Atlantic*, concluded that "the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements." Pet. App. 7a. In *Mid Atlantic*, however, the Fourth Circuit plainly stated that "while . . . it is not necessary to establish detrimental reliance by the victim in order to make out a violation of the federal mail fraud statute, such reliance *is* necessary to establish injury to business or property 'by reason of' a predicate act of mail fraud within the meaning of § 1964(c)" and directed the district court to resolve "the reliance issue" on remand. *Mid Atlantic*, 18 F.3d at 264 (emphasis added) (quoting *Brandenburg v. Seidel*, 859 F.2d 1179, 1188 n.10 (4th Cir. 1988)). Thus, *Mid Atlantic* supports the reliance requirement advocated here by petitioners.

In *Appletree Square I*, the Eighth Circuit affirmed the district court's order granting the defendants summary judgment on, *inter alia*, the plaintiffs' RICO claim predicated on mail and wire fraud. 29 F.3d at 1286-87. One of the plaintiffs alleged that it purchased a building from a third party and that it subsequently learned that the building had been constructed with an asbestos-containing fireproofing product manufactured by the defendants. The plaintiff alleged that the defendants had promoted use of the asbestos-containing product through a series of misstatements and misrepresentations. *Id.* The plaintiff did not allege, however, that any of the misstatements or misrepresentations had been directed towards it or that it had relied on any of the alleged misrepresentations in purchasing the building. *Id.* at 1287. In support of its decision affirming summary judgment for the defendants on the RICO claim, the court stated as follows: "Because [the plaintiff] has not produced any evidence to show it detrimentally relied on any of the alleged misrepresentations in its purchase of the building, it has failed to establish the existence of a genuine issue of material fact as to whether the alleged misrepresentations proximately caused its claimed injuries . . . ." *Id.*

In *Pelletier*, the Eleventh Circuit affirmed the district court's order granting summary judgment for the defendants on, *inter alia*, the plaintiff's civil RICO claim predicated on mail and wire fraud. 921 F.2d at 1498-1510. The plaintiff alleged that the defendants had fraudulently induced him to purchase stock in a company by misrepresenting facts about the worth of the company. The court concluded, however, that the record evidence established that the plaintiff had made his determination about the

worth of the company based solely on information he had obtained from other sources, and that the plaintiff had not relied upon the defendants' alleged misrepresentations. *Id.* at 1509-10. In support of its decision affirming summary judgment for the defendants, the court stated: "[A] plaintiff has standing to sue under section 1964(c) only if his injury flowed directly from the commission of the predicate acts. This means that, when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme." *Id.* at 1499-1500 (citation omitted); *see also Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002).

In *Brown v. Cassens Transport Co.*, the Sixth Circuit affirmed the dismissal of, *inter alia*, the plaintiff's civil RICO claim predicated on mail and wire fraud. 492 F.3d at 647. The plaintiffs—current and former employees of one of the defendants—alleged that the defendants—the employer, a claims adjuster, and a doctor—had engaged in a scheme that involved securing fraudulent medical opinions to unlawfully deny the plaintiffs' claims for workers' compensation benefits. The plaintiffs further alleged that the defendants sent fraudulent mail and wire communications among themselves and to the plaintiffs as part of this alleged scheme. *Id.* at 642. The plaintiffs did not allege, however, that they had relied on any of the mailings or wire communications. *Id.* at 643. In support of its decision affirming dismissal of the civil RICO claims, the court stated that "the well-established precedent of this circuit requires that a civil RICO plaintiff alleging mail or wire fraud plead reliance, that is, that a defendant made fraudulent representations to the plaintiff on

which the plaintiff relied." *Id.*; *see also Vandenbroeck*, 210 F.3d 696.

Thus, five circuits–the Fourth, Fifth, Sixth, Eighth and Eleventh—have held that reliance by the plaintiff is necessary to satisfy the proximate cause requirement for a civil RICO claim predicated on mail fraud.

The Fifth Circuit has recognized a "narrow exception to the requirement that the plaintiff prove direct reliance on the defendant's fraudulent predicate act." *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 223 (5th Cir. 2003). But this narrow target exception applies only "when the plaintiff can demonstrate injury as a *direct and contemporaneous* result of fraud committed against a third party." *Id.* (emphasis added). In *Sandwich Chef*, the Fifth Circuit held that its narrow target exception did not apply where insurance companies allegedly provided false information about their rates to a regulator, bills were then sent based on the allegedly falsified rates, and the plaintiffs then paid the allegedly falsified rates. As the court explained, "because it would always be necessary for the regulator to be deceived *and* for the policy holder to pay an unlawfully inflated premium . . . [t]he regulator's reliance on the fraudulent act would not alone be enough to result in a direct and contemporaneous injury to a policyholder that satisfies RICO's proximate cause requirement." *Id.* at 224 (emphasis in original).

Similarly here, Plaintiffs allege that false representations were made by petitioners and other defendants to the County Treasurer at the time that they submitted their registration applications for the County tax sales. As in *Sandwich Chef*, however,

Plaintiffs' alleged injury could not have occurred contemporaneously with the alleged misrepresentations by petitioners and other defendants; rather, their alleged injury could have occurred only at some later time after Plaintiffs elected to participate in the tax sales, bid on tax liens at the lowest penalty rate, and discovered (although Plaintiffs do not allege) that two or more related defendants bid on those same tax liens at that same lowest penalty rate. Thus, under *Sandwich Chef*, the County Treasurer's alleged reliance on petitioners' and other defendants' alleged misrepresentations could not alone have been enough to result in the "direct and contemporaneous injury" to Plaintiffs that is required to bring their claims within the Fifth Circuit's narrow target exception. Rather, it would always be necessary for the County Treasurer to be deceived *and* for the Plaintiffs to participate in a tax sale and to bid the lowest penalty rate on tax liens on which two or more petitioners or other related defendants had also bid the same rate. Consequently, the Fifth Circuit would require reliance by Plaintiffs to establish proximate cause in this case.

The conclusion that reliance by the plaintiff is necessary to satisfy the proximate cause requirement of a civil RICO claim predicated on mail fraud draws support from this Court's recent decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. ___, 128 S. Ct. 761 (2008), which addressed reliance by the plaintiff in the analogous context of a private securities fraud action under Section 10(b) of the Securities Exchange Act of 1934, 17 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 CFR §240.10b-5 (2007). In *Stoneridge*, investors in a cable TV company sued several defendants, including two companies that supplied digital cable converter boxes

to the cable operator. The investor plaintiffs alleged, among other things, that the cable box suppliers entered into sham transactions and backdated agreements with the cable operator and that they either knew about or recklessly disregarded the cable operator's intention to use these transactions to misrepresent its revenues and pump-up its stock prices. The district court dismissed the claims against the cable box suppliers for failure to state a claim on which relief could be granted, and the Eighth Circuit affirmed. This Court granted certiorari to consider whether an injured investor may sue under Section 10(b) to recover from a party that neither makes a public misstatement nor violates any duty to disclose but arguably does participate in a scheme to defraud. *Stoneridge*, 128 S. Ct. at 767-78.

After interpreting the court of appeals' decision as holding that any deceptive statement or act by the cable box suppliers was not actionable "because it did not have the requisite proximate relation to the investors' harm," this Court stated that "[t]hat conclusion is consistent with our own determination that [the box suppliers'] acts or statements were not *relied upon* by the investors and that, as a result, liability cannot be imposed upon [them]." 128 S. Ct. at 769 (emphasis added). Similarly here, a plaintiff who asserts a civil RICO claim predicated on mail fraud cannot show the requisite proximate relation between his harm and the defendant's conduct where the defendant's statements were not relied upon by the plaintiff.

D. Plaintiffs Are Unable To Satisfy Civil RICO's Proximate Cause Requirement Because It Is Undisputed That They Did Not Rely On The Misrepresentations Allegedly Made By Petitioners or Other Defendants To The County Treasurer.

Plaintiffs do not allege that they relied on the misrepresentations that petitioners and other defendants allegedly made to the County Treasurer regarding their compliance with the SSB Rule. Nor do Plaintiffs allege that they either acted or refrained from acting in reliance on these alleged misrepresentations, or that they even knew about them at any relevant time. Nor do they allege that any of the mailings at issue in this case contained a misrepresentation or that any Plaintiff ever received, let alone relied on, any of these mailings.

A peculiar aspect of this case is that the alleged misrepresentations on which the civil RICO claims are based were not mailed to anyone. Although the court of appeals speculated in its opinion that perhaps the mails had been employed "to send affidavits" (Pet. App. 3a), Plaintiffs have not alleged that any affidavits were mailed to the County Treasurer by petitioners or any other defendants. Rather, the only mailings alleged by Plaintiffs are the routine post-auction notices sent by the County to property owners, and those notices are not even alleged to have contained any misrepresentations. As a result, this is a civil RICO action based on mail fraud, but the case involves no fraudulent mailings.

Nevertheless, even if the defendants' registration and acknowledgement forms attesting to compliance with the SSB rule had been mailed to the County

Treasurer, the result here would be the same. The alleged misrepresentations still would not have been sent to or received by the plaintiffs. And the alleged misrepresentations still would not have been relied upon by the plaintiffs.

Given the absence of any allegation of reliance by Plaintiffs on the alleged misrepresentations on which their claims are based, they cannot satisfy the proximate cause requirement of their civil RICO claims predicated on mail fraud.

III. RELIANCE BY THE PLAINTIFF IS A NECESSARY AND APPROPRIATE LIMITATION ON THE SCOPE OF CIVIL RICO CLAIMS PREDICATED ON MAIL FRAUD.

A. Civil RICO Plaintiffs Are Unchecked By Prosecutorial Discretion And The Common-Sense Liability Limitation Of Reliance By The Plaintiff Is, Therefore, Appropriate In Civil RICO Claims Predicated on Fraud.

This Court has noted that § 1964 was not intended to expand federal jurisdiction into traditionally state law claims without limitation. Rather, "private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 493 (1985). The predicate acts of the RICO statute, however, potentially cover a broad range of conduct, especially the mail and wire fraud statutes. Indeed, as then-Chief Justice Rehnquist noted, "[w]ith the growth of long distance communication and technology, mail fraud and wire fraud—which applies to all telephone

calls—have a much wider sweep now than they did when the statutes were enacted." Hon. William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 10 (1989).

In the criminal context, the breadth of the mail and wire fraud statutes "exists against a backdrop of prosecutorial discretion . . . which, if sensitively exercised, operates as a check to the improvident exertion of federal power." *Schreiber Dist. Co. v. Serv-well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J. concurring). But, as then-Chief Justice Rehnquist observed, "there is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys. Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorney's fees which civil RICO holds out." *Remarks of the Chief Justice,* 21 St. Mary's L.J. at 10; *see also Schreiber,* 806 F.2d at 1402 (Kennedy, J., concurring) ("A company eager to weaken an offending competitor obeys no constraints when it strikes with the sword of [RICO]."). These concerns voiced by present and former members of this Court militate strongly in favor of the requirement that a civil RICO plaintiff who asserts claims predicated on mail or wire fraud be required to establish that he relied on the alleged misrepresentation of the defendant.

B. A Reliance Requirement Ensures A Direct Relationship Between The Injury And The Alleged Fraud, Preventing The Over-Federalization Of Traditional State Law Claims.

A requirement of reliance serves as a "commonsense liability limitation," helping to prevent plaintiffs from wielding the threat of treble damages and attorneys' fees in federal court in support of meritless claims. *Summit Props.*, 214 F.3d at 562. As this Court recently observed in the analogous context of the federal securities laws, the potential for abuse is significant because "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge*, 128 S. Ct. at 772. Although *Stoneridge* addressed the "essential element" of reliance under the federal securities laws, the Court's description of the role a reliance element plays in fraud cases is equally applicable to civil RICO claims. The core purpose of reliance is to "ensure[] that, for liability to arise, the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability." *Id.* at 769 (citation omitted). This was the very reason a proximate cause requirement was recognized by this Court in *Holmes* and that a reliance requirement is necessary for civil RICO claims predicated on fraud.

In *Summit Properties,* the Fifth Circuit warned that "[t]o hold [that reliance is not required] would allow the threat of treble damages and attorney fees to infiltrate garden variety products liability cases whenever marketing promotions touted the merits of

the products, even if no plaintiff relied on those representations." 214 F.3d at 562. As the Fifth Circuit observed, it is highly unlikely that Congress intended "such a federalization and escalation of the states' laws of product liability [or other common law claims]." *Id.* Indeed, without a requirement of reliance by the plaintiff, civil RICO would not only over-federalize traditional state law claims, it would also expand the reach of RICO into claims that would not even satisfy traditional state law requirements for fraud.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to dismiss Plaintiffs' civil RICO claims.

Respectfully submitted,

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OPPOSITION BRIEF

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IN THE

Supreme Court of the United States

SABRE GROUP, LLC, ET AL.,
PETITIONERS,

v.

PHOENIX BOND & INDEMNITY CO., ET AL.,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff who is the direct and immediate target of a fraudulent scheme involving false statements to a third party with whom the plaintiff deals may establish the proximate cause necessary to maintain a claim under civil RICO, even though the plaintiff itself did not receive the false statements.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Sabre Group, LLC; Barrett Rochman; and John Bridge. Petitioners are defendants in this case.

Respondents are Phoenix Bond & Indemnity Company and BCS Services, Inc. Respondents are plaintiffs in the action.

Other parties in the Court of Appeals were defendants Robert Jensen; Joseph Varan; Jeffrey Bridge; Francis Alexander; Jesse Rochman; Douglas Nash; Cronus Projects, LLC; Gregory Ellis; GJ Venture, LLC; L.C.C. Venture, LLC; Regal One, LLC; Jason Baumbach; Optimum Financial, Inc.; Carpus Investments, LLC; DRN II, Inc.; Jeshay, LLC; Mud Cats Real Estate, LLC; Georgetown Investors, LLC; Corinne Rochman; Christopher Rochman; BRB Investments, LLC; and CCJ Investments, LLC. The Court of Appeals dismissed plaintiff Oak Park Investments, Inc. as a party.

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

Phoenix Bond & Indemnity Company has no parent corporation, and there is no publicly held company that owns 10% or more of its stock. BCS Services, Inc. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Introduction

This case presents no issue worthy of this Court's review. Respondents, plaintiffs below, allege that petitioners lied under oath to officials of Cook County, Illinois, and thereby stole valuable tax liens the County otherwise would have awarded to respondents. As the Court of Appeals found, because petitioners and respondents offered the County the identical price for the tax liens, the County did not suffer injury as a result of the misrepresentations. Indeed, "Cook County did not lose even a penny. . . . The *only* injured parties are the losing bidders, who acquire fewer tax liens than they would" absent defendants' fraudulent scheme. Pet. App. 5a (emphasis in original). Based on these facts, the court held that respondents could establish the proximate cause required under RICO consistent with this Court's decisions in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). The decision of the Court of Appeals is correct, does not conflict with any other case presenting the same issue, and warrants no action by this Court.

The question on which petitioners would have this Court grant review is not the question decided by the Seventh Circuit. Petitioners contend that the question here is whether "a plaintiff asserting a civil RICO claim predicated on acts of mail fraud must plead and prove reliance on alleged

misrepresentations by the defendant," Pet. at (i), a question on which, according to petitioners, the circuits are sharply split. *Id.* at 6-7. But the Court of Appeals had no occasion to discuss whether respondents "must plead and prove reliance," in part because petitioners themselves argued that the issue of reliance was "largely academic" in that the district court "did not discuss reliance as a standing requirement at all." *See* Br. of Appellees Bridge, *et al.* at 14 (7th Cir. filed Oct. 6, 2006), *available at* 2006 WL 2967014.[1]

Rather, the question addressed by Judges Easterbrook, Posner, and Evans below is whether it is necessary in a RICO action predicated on fraud "to show that the false statement was made to the victim." Pet. App. 7a. On that question, the court unanimously concluded that "the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements." *Id.* (emphasis in original). Thus, the sole issue in this case is whether reliance *by the plaintiff itself* is necessary to establish proximate cause under RICO, or whether reliance by a third party with whom the plaintiff deals suffices *where the plaintiff is the immediate target and victim of the fraudulent scheme.*

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[1] Although the issue of reliance (by someone) was not squarely presented to the Seventh Circuit, the parties have never disputed that the County Treasurer did in fact rely on petitioners' false certifications in allowing petitioners' entry to the auction. *See, e.g.*, Compl. ¶¶ 47-48, 50-56, 59, 61, 63-65 (N.D. Ill. filed Jul. 15, 2005).

On that issue, there is no circuit split requiring this Court's attention. *Every* circuit to consider the issue in a case presenting it – the Second, Fourth, Fifth and Seventh – has held that reliance by a third party with whom the plaintiff deals can be sufficient under RICO when the plaintiff is the direct and immediate target of the fraud. Only the Sixth Circuit has suggested otherwise, and the continuing vitality of the Sixth Circuit's position on the issue is open to doubt. Although other circuits have required "reliance," they have never considered whether reliance by a third party may suffice where the plaintiff is the immediate target of the fraud and has been directly injured thereby.

Because the decision of the Court of Appeals does not conflict with other courts and is correct, the petition should be denied.

B. Factual Background

This case arises on a motion to dismiss, so respondents' allegations are presumed to be true.

A property owner's failure to pay taxes creates a tax lien in favor of the County. Pet. App. 1a. Instead of pursuing its rights as the holder of such tax liens, Cook County annually sells the liens at auction. *Id.* at 1a, 10a. To purchase the lien, a bidder must pay the County the taxes due. In addition, the holder of a tax lien has the right to receive a statutory penalty assessed upon the property owner, up to a maximum of 18%. However, bidders at the County's tax lien auctions compete

against each other by identifying the penalty that will be imposed upon the property owner to clear the lien, and the bidder willing to accept the *lowest* penalty wins the auction. *Id.* at 1a-2a. The new lien holder then may assert its rights under the lien. If the property owner redresses the lien by paying the back taxes and statutory penalty (in the amount established through the auction), the owner may retain the property. If the owner does not pay, the lien holder can obtain a tax deed and thus become the parcel's new owner. *Id.* at 1a.

Because many of the parcels at issue have economic value beyond the amount of the unpaid taxes, most parcels at the County's tax lien auctions attract multiple bidders willing to accept a 0% penalty. *Id.* at 2a. Bidders expect to make their profits not by collecting penalties from property owners, but primarily from reselling the properties of owners who do not pay. *Id.* As described by the Court of Appeals: "Vigorous competition among bidders has driven the winning penalty down to the floor, and from the County's perspective this is all to the good: it recovers the taxes, and owners need not pay extra." *Id.*

The County then must address a different issue: how to choose among multiple, identical bids. *Id.* The County's regulations prohibit bids proposing a "negative" penalty, because property owners then would have an incentive not to pay their taxes at the originally assessed full value. *Id.* Instead, the County assigns parcels among identical bidders on a rotational basis. Critically, to prevent a party from

increasing its chances in this allocation process, each "tax buying entity" must certify that it has bid in its own name, and no "related entity" may bid. *Id.* The County calls this rule the "Single, Simultaneous Bidder Rule." *Id.*

Respondents are two regular participants in Cook County's tax lien sales. *Id.* at 3a. Respondents contend that petitioners Sabre Group, LLC and its principal Barrett Rochman regularly arrange for related firms to participate in the tax lien auctions in violation of the Single Simultaneous Bidder Rule and that they disguise this fact by submitting false affidavits to the County, a potentially criminal offense. *Id.* Respondents contend that the County Treasurer relies on those false affidavits to award more parcels to petitioners than they otherwise would win, at respondents' expense. *See* n. 1, *supra.* Because petitioners' fraudulent scheme involves the use of the mail, and involves a regular pattern of mail fraud, respondents sought damages from petitioners under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964.

C. Proceedings Below

Petitioners moved to dismiss under Rules 12(b)(1) and 12(b)(6). They argued the case should be dismissed under Fed. R. Civ. P. 12(b)(1) because respondents lacked "standing" and, therefore, the District Court lacked subject matter jurisdiction. Petitioners also argued the complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) because

respondents failed adequately to allege a RICO enterprise and to plead fraud with particularity.

The District Court granted petitioners' motion under Rule 12(b)(1). At bottom, the court held that respondents lacked standing to sue under RICO because they "were not recipients of the alleged misrepresentations." Pet. App. 18a.

Respondents appealed, contending in part that the District Court improperly incorporated into civil RICO a requirement of reliance *by the plaintiff* on defendants' false statements. On that point, petitioners responded that the issue of reliance was "largely academic" because "the district court did not discuss reliance as a standing requirement at all." *See* Br. of Appellees Bridge, *et al.* at 14 (7th Cir. filed Oct. 6, 2006), *available at* 2006 WL 2967014. Petitioners argued, however, that respondents could not establish proximate cause. *Id.* at 25. Neither in their brief nor at oral argument did petitioners ask the Court of Appeals to affirm on the ground that respondents had not pled, and could not prove, reliance.

The Court of Appeals reversed in a unanimous opinion written by Chief Judge Easterbrook. The court first concluded that "standing" was not a problem in the suit: "Plaintiffs suffer injury in fact, and that injury can be redressed by damages. Extra bids reduce plaintiffs' chance of winning any given auction, and loss of a (valuable) chance is real injury." Pet. App. 3a. Because plaintiffs suffer an actual (and substantial) reduction in the number of

liens they take away, "[n]o more need be said about standing." *Id.* at 4a.

The court then addressed the issue of proximate cause. Applying the causation analysis this Court outlined in *Holmes* and developed further in *Anza*, the Court of Appeals assessed whether respondents were the direct victims of petitioners' alleged fraud:

> Defendants maintain that Cook County is the victim of their fraud (supposing, as they must at the pleading stage, that they have committed fraud). Yet Cook County did not lose even a penny: each winning bidder always pays all back taxes and interest. The bidding at these auctions concerns how much the owners must pay in penalties, not how much the County receives. And as long as competition drives the bidding down to 0% penalty, property owners are indifferent to who acquires the tax lien. The *only* injured parties are the losing bidders, who acquire fewer tax liens than they would if the Single, Simultaneous Bidder Rule were followed.

Id. at 5a (emphasis in original). These facts, the court emphasized, were sufficient to establish proximate cause. The court noted that the County doubtless could enforce its own rule, but it had no financial incentive to do so. Moreover, "[i]f a

government's ability to penalize fraud knocked out private litigation, then § 1964 would no longer apply when the predicate act is fraud, for governments always have some ability to detect and penalize frauds." *Id.* at 6a-7a.

The Court of Appeals also declined to accept petitioners' argument that respondents could not sue because "no false statements were made to plaintiffs." *Id.* at 7a. Relying on its own precedent as well as decisions in several other circuits, the court held that "the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements." *Id.* (emphasis in original). Thus, "[a] scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's." *Id.* The court thus emphasized that "injury must be direct rather than derivative," but found that requirement to be satisfied here. *Id.* at 8a.

REASONS FOR DENYING THE WRIT

To bolster their petition, petitioners mischaracterize the positions of the circuits on the issue presented in this case, making claims at odds even with the position they took in the Court of Appeals. As set forth below, the result in this case would be the same in every other circuit to have considered the issue presented here except perhaps the Sixth – and *every* member of the Sixth Circuit's most recent panel decision addressing the issue suggested that the position of the Sixth Circuit was

wrong. This case simply does not present the issue whether "reliance" generally is required in RICO actions based on fraud. Rather, the issue here is whether it always must be the *plaintiff* that has received and relied upon the false statements at issue. And every circuit to have considered that issue in a case that presented it has concluded that such reliance *by the plaintiff* is not always required.

The petition should be denied. There is a pending petition for rehearing *en banc* from the most recent panel decision in the Sixth Circuit, and the Sixth Circuit may reconsider its outlier position in that case (or in another case that squarely presents the issue whether reliance *by the plaintiff* always is required in RICO cases involving fraud). In any event, because the decision of the Seventh Circuit here is correct and in line with all other circuits that have considered the issue in a case that presented it, this Court should wait to consider the issue until it is squarely presented in a conflicting decision from the Sixth. In addition, further factual development in the instant case may show that reliance even *by the plaintiff* is present here. Thus, this case is not yet in a posture where an appropriate assessment of the issues of reliance and proximate cause may be made.

A. No Ripe Conflict Exists.

Cases brought under RICO have been assessed under a variety of analytical frameworks to determine whether the plaintiff is an appropriate person to bring a RICO claim. The issue has been considered at times as one of "standing," as one

involving the "zone of interests" defined by the statute, as one involving the "directness" or "proximate causality" between the plaintiff's injury and the challenged conduct, and as one of "reliance." In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court granted certiorari to resolve a conflict among the circuits whether a civil RICO plaintiff that had not purchased or sold a security had "standing" to sue based upon a predicate act of alleged securities fraud. Instead of deciding that issue, however, the Court ruled that the plaintiff could not establish proximate cause, and it observed that "[a] review of the conflicting cases shows that all could have been resolved on proximate-causation grounds." *Id.* at 276.

The Court's decision in *Holmes* is instructive because it establishes the context for the circuit split alleged to exist here. The Court held that the statutory language in RICO creating a civil claim for "[a]ny person injured in his business or property *by reason of* a violation of section 1962 of this chapter," 18 U.S.C. § 1964(c) (emphasis added), requires a plaintiff to prove that its injury was proximately caused by the violation of the Act. 503 U.S. at 268. The Court explained that it used the term "proximate cause" in the broad common law sense, which included "a demand for *some direct relation between the injury asserted and the injurious conduct alleged.* Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third party by the defendant's acts was *generally* said to stand at too remote a distance to

recover." *Id.* at 268-69 (emphasis added). The Court emphasized that among the reasons for this rule were: the difficulty of ascertaining the plaintiff's damages as its injury became less direct; the difficulty of apportioning damages among plaintiffs removed at different levels of injury; and the lack of any *need* for such claims in deterring injurious conduct "since directly injured victims can generally be counted on to vindicate the law as private attorneys general." *Id.* at 269-70.[2] In finding no proximate cause in the case, the Court emphasized that the plaintiff's injury was indirect and flowed from factors unrelated to the defendant's alleged wrongdoing, and that other directly injured private parties "could be counted on to bring suit for the law's vindication" (and had, in fact, already sued). *Id.* at 273.

The decision of the Seventh Circuit in the instant case is squarely in line with *Holmes*, and virtually all other circuits, in recognizing that *proximate cause* is the statutory touchstone in civil RICO cases. Moreover, every circuit to consider the issue but possibly the Sixth has ruled, like the Seventh here, that a showing of proximate cause may be made where a RICO plaintiff is a direct *victim* or *target*, but not necessarily the *recipient*, of

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[2] The Court has recognized that by including a private right of action in RICO, Congress intended to bring "the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources [were] deemed inadequate." *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987).

acts of mail or wire fraud by defendants. *That* was the issue in this case – *not* whether "reliance by someone" is required to establish the requisite causal link between the plaintiff's injury and the defendant's alleged RICO violations.

Judge Easterbrook's conclusion that proximate cause could be established on the facts of this case is fully consistent with *Holmes*. The fraudulent scheme at issue here led directly to plaintiffs' injuries: defendants did not seek to harm the County or property owners, but rather sought to inflate their own share of valuable tax liens at the direct expense of plaintiffs and other bidders who otherwise would have been awarded those liens at the auction. Moreover, because liens were allocated on a rotational basis to bidders making the identical bid (a 0% penalty to property owners), plaintiffs' injuries could not have resulted from factors other than defendants' alleged acts of fraud. Finally, this is not a case where any other entity has an economic incentive, and necessarily could be expected, to sue (or already had sued).

Petitioners allege that the decision below conflicts with decisions of the Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits. Pet. at 6-7. That is incorrect. In ruling that plaintiffs need not have been the recipient of the false statements at issue to establish proximate cause, the Seventh Circuit

agreed with virtually every other circuit that has considered that issue.[3]

An early decision after *Holmes* was *Mid Atlantic Telecom, Inc. v. Long Distance Services., Inc.*, 18 F.3d 260 (4th Cir. 1994). In that case, a RICO plaintiff contended that defendant, a competitor, had engaged in a fraudulent scheme involving mail and wire fraud directed at plaintiff's *customers*, thereby injuring plaintiff. The district court granted summary judgment for defendant. On appeal, the Fourth Circuit reversed even though it recognized that plaintiff did not allege it had received the mailings or telephone calls at issue. *Id.* at 263. The court emphasized it had not intended in its previous decisions "to establish a rule that only injuries suffered by the immediate victim of a predicate act satisfied the 'by reason of' requirement of § 1964(c)." *Id.* Here, "[g]iven the opportunity to engage in discovery," plaintiff Mid Atlantic "may be able to show that while the scheme was initially aimed only at defrauding LDS customers, Rice

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[3] It is significant that in their petition for rehearing *en banc* below, petitioners acknowledged that the Fourth and Fifth Circuits "recognize a very narrow exception where a third party (not the plaintiff) relies on a fraudulent misrepresentation but the plaintiff was, in fact, the intended target of the scheme." *See* Pet. for Reh'g *En Banc* of Appellees Bridge, *et al.*, at 9 (7th Cir. filed Mar. 5, 2007) (citing *Sandwich Chef of Texas* and *Mid Atlantic*, discussed *infra*). Petitioners also acknowledged that the Seventh Circuit may have viewed the instant case as falling within "the narrow confines of the 'target' exception to the reliance requirement." *Id.* In their petition for certiorari, however, petitioners make no reference to that issue, which is in fact the very issue in this case.

broadened the sweep of the intrigue to include Mid Atlantic as a direct target (i.e., to obtain an unfair competitive advantage in recruiting Mid Atlantic customers)." *Id.* The court concluded that "[a] finding of proximate cause in such a situation would not be at odds with the Supreme Court's holding in *Holmes*, since Mid Atlantic is not seeking to vindicate the rights of its former customers . . . " *Id.* at 264.

Although petitioners now count the Fourth Circuit as one of the circuits requiring "reliance," *see* Pet. at 6 (*but see* n. 3, *supra*), it is apparent the Fourth Circuit does *not* always require that the *plaintiff* have received and relied upon the fraudulent statements at issue. Just as the Seventh Circuit recognized here that plaintiffs were the *only* parties injured by the fraudulent scheme at issue, Pet. App. at 5a, the Fourth Circuit allowed a RICO claim to proceed where the plaintiff was the "direct target" of the fraudulent predicate acts.[4]

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[4] In the concluding portion of its opinion, the Fourth Circuit commented that if Mid Atlantic "was aware" of defendant's use of the fraudulent billing program, then Mid Atlantic could not have "relied" on defendant's proffered lower rates in setting its own rates. 18 F.3d at 264. This is a different issue than whether the plaintiff must have received and relied upon the false statements at issue. A party's knowledge of the defendant's fraud before it was injured may, depending on the facts, foreclose recovery. However, to the extent respondents here must prove they acted reasonably in reliance on petitioners' compliance with the Single, Simultaneous Bidder Rule, their reasonable reliance has not been challenged and remains an issue for trial. *See supra* n. 1; *infra* at 28-29. It

The Fifth Circuit – another one of the circuits now claimed by petitioners, *see* Pet. at 6 (*but see* n. 3, *supra*) – later decided a case on all fours with *Mid Atlantic*. In *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001), plaintiff P&G brought RICO and other claims, contending defendants had sent false and disparaging statements about P&G to consumers. The district court dismissed the RICO claim because P&G had not alleged it relied on the false statements. The Fifth Circuit reversed. It explained that *generally* in "civil RICO claims in which fraud is alleged as a predicate act, reliance on the fraud must be shown," *id.* at 564, but that there also was "a narrow exception to this rule." *Id.* Relying on its earlier decision in *Summit Properties Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561 (5th Cir. 2000), which in turn had relied on *Mid Atlantic*, the Fifth Circuit ruled that "a target of a fraud that did not itself rely on the fraud may pursue a RICO claim if the other elements of proximate causation are present." *Proctor & Gamble*, 242 F.3d at 564-65.

That is precisely what the Seventh Circuit ruled here. Moreover, just like respondents' claim here, P&G's claim fell squarely within this narrow

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also was in this same sense that the court in *Chisolm v. TranSouth Financial Corp.*, 95 F.3d 331 (4th Cir. 1996) – a case relied on by petitioners – required "reliance" by the plaintiff. *See id.* at 339 (remanding to allow RICO claim to go forward so long as plaintiffs amended their complaint to plead what they had argued in the case, which was simply that they had acted in "*reliance* on the apparent legitimacy and legality of the operation") (emphasis in original) (internal citations omitted).

exception: "if P&G's customers relied on the fraudulent rumor in making decisions to boycott P&G products, this reliance suffices to show proximate causation." *Id.* at 565; *see also Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 223 (5th Cir. 2003) (noting narrow exception to the requirement that a RICO plaintiff prove direct reliance on the fraudulent predicate act, which "only comes into play when the plaintiff can demonstrate injury as a direct and contemporaneous result of fraud committed against a third party").

In *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251 (2d Cir. 2004), *rev'd on other grounds*, 126 S. Ct. 1991 (2006), the Second Circuit agreed that a civil RICO plaintiff need not always prove his *own* reliance on predicate acts of mail or wire fraud to establish the necessary element of proximate cause. Rather, as in *Mid Atlantic* and *Proctor & Gamble*, the court held that "where a complaint contains allegations of facts to show that the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was intended to and did give the defendant a competitive advantage over the plaintiff," the complaint adequately pleads proximate cause, "even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." *Id.* at 263.

This Court reversed, although not because of plaintiff's undisputed inability to prove his own reliance on the defendant's misrepresentations. Rather, the Court held that plaintiff could not

establish proximate cause because the alleged violation did not lead directly to plaintiff's injuries. 126 S. Ct. at 1997-98. Rather, plaintiff's lost sales readily could have resulted from factors other than defendants' alleged acts of fraud, and direct victims had been defrauded and could be expected to sue for damages. *Id.* In a separate opinion, Justice Thomas disagreed with the Court's proximate cause analysis and thus reached, but rejected, the contention that "reliance" was an independent element required under RICO. Justice Thomas emphasized that "the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action." *Id.* at 2008 (Thomas, J., concurring in part and dissenting in part).[5]

Finally, although the Ninth Circuit has not decided whether reliance by the plaintiff is always required in civil RICO actions, it too has been careful to frame the controlling issue as one of *causation*, not *reliance*. In *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004), the court emphasized that "[c]ausation lies at the heart of a civil RICO claim" and that, "[i]n some cases, reliance may be a 'milepost on the road to causation.'" *Id.* at 664

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[5] Justice Breyer also dissented in part in *Anza* and explained that claims based on "illegitimate competitive means" could be actionable; thus, "[c]laims involving RICO violations that *objectively target a particular competitor, e.g.*, bribing an official to harass a competitor, could also be actionable." 126 S. Ct. at 2011 (Breyer, J., concurring in part and dissenting in part) (emphasis added).

(internal citation omitted). In the case before it, the court held that "reliance provides a key causal link" between the defendants' alleged misrepresentations and the plaintiffs' injury. *Id.* at 665. But it emphasized that it had not decided "whether reliance is the *only way* plaintiffs can establish causation in a civil RICO claim predicated on mail fraud" and that "we have been careful to frame the controlling issue in terms of causation, not reliance." *Id.* at 666 (emphasis in original). Similarly, in *Living Designs, Inc. v. E.I. DuPont de Nemours and Co.*, 431 F.3d 353 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 2861 (2006), the court did not address the issue, because it found that plaintiffs had adequately pleaded that they "reasonably relied on [DuPont] to obey statutes, court orders, court rules, rules of evidence, written agreements, representations to the court by officers of the court, and representations made under oath to the court by [DuPont]'s officers and agents." *Id.* at 363 (quoting complaint; alteration in original).[6]

Indeed, only one circuit – the Sixth – appears to hold that a civil RICO claim may be established only upon a showing in every case that *plaintiff itself*

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[6] The First Circuit has broadly refused to "depart from RICO's literal language by importing a reliance requirement into RICO," *Systems Management, Inc. v. Loiselle*, 303 F.3d 100, 104 (1st Cir. 2002), and thus has viewed the issue just as Justice Thomas did in his later opinion in *Anza*. Even so, the First Circuit has agreed that "[r]eliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way." *Id.*

relied on defendant's false statements.[7] In its most recent decision on the issue, however, all three judges of the panel questioned this position. *Brown v. Cassens Transp. Co.*, 492 F.3d 640 (6th Cir. 2007). Judge Gibbons, writing for the court, noted that "we may quarrel with the soundness of [the] conclusion" that reliance is required under civil RICO when it is not required as an element of criminal mail and wire

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[7] In its decision below, the Seventh Circuit also identified the Eleventh as requiring reliance by the plaintiff in RICO cases involving fraud, citing *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002). It does not appear, however, the Eleventh Circuit has ever considered a RICO case in which the plaintiff was the direct target of a fraudulent scheme involving statements made to and relied on by others. Certainly, *Sikes* was not such a case. *Sikes* was a consumer class action in which all members of the purported plaintiff class had, in fact, personally received the false statements at issue. *Id.* at 1355, 1362. Nor was a question of third party reliance presented in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), relied on by petitioners. Moreover, in *Beck v. Prupis*, 162 F.3d 1090 (11th Cir. 1998), *aff'd*, 529 U.S. 494 (2000), the Eleventh Circuit stated that a RICO claim *could* be established "if the plaintiff has alleged an injury proximately caused by the defendants' acts of racketeering *that target the plaintiff*." *Id.* at 1096 n.10 (emphasis added). And in its most recent RICO jurisprudence, the Eleventh Circuit has moved away from any reliance analysis and, in keeping with this Court's decision in *Anza*, has instead focused on proximate cause. *See Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007). Similarly, although the Eighth Circuit generally requires "detrimental reliance" in RICO actions, *see Appletree Square I Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994), it is not clear whether it would recognize the narrow "target" exception found by other circuits in a case that presented the issue.

fraud. *Id.* at 644. Judge Gibbons also described as "legitimate" the conclusion of the First Circuit that RICO's terms do not require reliance. *Id.* at 646 n.3. Nevertheless, she explained that "[e]ven if we accept plaintiffs' view that our RICO jurisprudence has gone astray in imposing a reliance requirement on plaintiffs pursuing private actions under § 1964(c), our mere belief that a prior case was wrongly decided is insufficient to permit reversal of the decision of a previous panel." *Id.* at 646. Judge Ackerman concurred but emphasized that "RICO, properly construed, does *not* require that a plaintiff plead or demonstrate reliance in a civil RICO case based upon the predicate acts of mail or wire fraud." *Id.* at 651 (emphasis added) (Ackerman, J., concurring). Judge Moore dissented in part and urged that "we should convene the en banc court to reexamine . . . whether a civil-RICO claim incorporates the element of reliance." *Id.* at 651 (Moore, J., concurring in part and dissenting in part). Such a petition for *en banc* review is, in fact, still pending in the case.[8]

Thus, petitioners simply are wrong in contending in this Court there is a 5-3 split, in favor of *petitioners*, on the issue decided by the Seventh Circuit. Pet. at 6-7. To be sure, *all* the circuits appear to agree that reliance generally is a "milepost on the road to causation," *Poulos*, 379 F.3d at 664 (internal quotation marks omitted), and also that reliance is "doubtless the most obvious way in which

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[8] *See Brown v. Cassens Transport Co.*, No. 05-2089 (6th Cir.) (petition for *en banc* rehearing filed July 24, 2007; response directed by court Aug. 24, 2007; response filed Sept. 7, 2007).

fraud can cause harm," *Loiselle*, 303 F.3d at 104. But of all the circuits that have considered the issue presented here, only the Sixth Circuit has potentially rejected (as foreclosed by earlier decisions) the proposition that, in narrow circumstances such as those presented in this case, in *Mid Atlantic*, and in *Proctor & Gamble*, proximate cause can be established by the direct *target* or *victim* of a fraudulent scheme, even where the false statements at issue were sent to and relied on by a third party.[9]

In sum, the circuit cases taken together are consistent on several key points. Where the plaintiff is the *recipient* of the alleged false statements (as indeed most often is the case), the plaintiff generally must have relied on those statements to be able to establish proximate cause. This simply is an adjunct of the logical proposition, discussed further below, that if the *recipient* did not rely on the false statements at issue, it is difficult to prove that those statements caused any injury. *See infra* at 27. In addition, a plaintiff's *knowledge* of the fraud may foreclose recovery, either because as the recipient plaintiff cannot reasonably rely on statements it knew to be false, or possibly because with knowledge of the fraud plaintiff may have been able to avoid its injury. Stated more generally, in an appropriate case the plaintiff may be required to show that it acted reasonably in reliance upon a perceived

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[9] As explained *infra* at 22, although the Sixth Circuit rejected the proposition as foreclosed by its earlier decisions, it also noted that the issue was not actually presented in the case before it.

absence of fraud. But the cases that have considered the issue also have consistently held that the *plaintiff itself* need not always be the party that received and relied on the false statements at issue, so long as its injury is direct and not derivative. As a result, there is no ripe conflict among the circuits, and the Court need not intervene.

B. The Court Should Deny the Petition.

There are at least three reasons why the petition in this case should be denied.

1. First, even accepting that one circuit has indicated its position is in conflict with the decisions in *Mid Atlantic*, *Proctor & Gamble*, and other cases, this acknowledged "conflict" may well resolve itself. As noted above, a petition for *en banc* consideration is presently pending in the Sixth Circuit, with judges openly calling for the case to be reheard.

Further, even if the Sixth Circuit were to deny the pending petition for *en banc* review, the conflict might still resolve itself. The Sixth Circuit could well decide that the issue is not properly presented in that pending case. *See Brown*, 492 F.3d at 645 n.2 (noting that the "reliance by a third party" allowed in *Mid Atlantic* and *Proctor & Gamble* would not change the result in the case before it, because plaintiffs conceded that "their original complaint contained no allegations of reliance by a third party," plaintiffs had been denied leave to amend, and plaintiffs had not appealed that decision). Given the express call in *Brown* that the circuit address the

issue *en banc*, the Sixth Circuit might accept *en banc* review in another case when the issue is squarely presented.

2. Second, the decision below is correct, consistent with the language of the RICO statute, and supported by substantial other authority. The Court should wait to consider the issue until it is squarely presented in a conflicting decision from the Sixth Circuit – the only circuit with a potentially inconsistent position on this issue.

As the Court recognized in *Holmes* and *Anza*, the touchstone of the inquiry of who may bring claims under RICO is proximate cause. That requirement of proximate cause, which imposes "a demand for some direct relation between the injury asserted and the injurious conduct alleged," *Holmes*, 503 U.S. at 268, flows directly from the statutory language that a RICO plaintiff must be injured "by reason of" an unlawful predicate act. 18 U.S.C. § 1964(c). As Justice Thomas – the only Justice to reach and consider the issue – explained in his separate opinion in *Anza*, however, "[b]ecause an individual can commit an indictable act of mail or wire fraud even if no one relies on his fraud, he can engage in a pattern of racketeering activity, in violation of § 1962, without proof of reliance." *Anza*, 126 S. Ct. at 2007 (Thomas, J., concurring in part and dissenting in part). Justice Thomas recognized that "reliance" is a "specialized condition" required for common law fraud, but one that finds no place in the language of RICO:

> [T]here is no language in § 1964(c) that could fairly be read to add a reliance requirement in fraud cases only. Nor is there any reason to believe that Congress would have defined 'racketeering activity' to include acts indictable under the mail and wire fraud statutes, if it intended fraud-related acts to be predicate acts under RICO only when those acts would have been actionable under the common law.

Id. at 2008. Thus, although Justice Thomas recognized that proof of reliance often could be used to prove the element of *causation*, that fact "does not transform reliance itself into an element of the cause of action." *Id.*

Although Justice Thomas is the only Justice to have considered the issue directly, his conclusion is consistent with the Court's RICO jurisprudence and the views of other Justices. The Court repeatedly has focused on proximate cause as the touchstone determining who may bring claims under RICO, even when it was apparent in *Anza* that the plaintiff had not "relied" on the fraudulent statements at issue. Moreover, as noted above, in his separate opinion in *Anza*, Justice Breyer would have found proximate cause present for "[c]laims involving RICO violations that objectively target a particular competitor" through "illegitimate" means. 126 S. Ct. at 2011 (Breyer, J., concurring in part and dissenting in part).

Justice O'Connor's concurrence in *Holmes*, joined by Justices White and Stevens, also is significant. Justice O'Connor would have reached the question presented in the case and would have ruled that although plaintiff had not established proximate cause, it *did* have "standing" to bring a RICO claim, despite the fact it had not purchased or sold a security in reliance upon the defendants' fraudulent conduct. Justice O'Connor emphasized that the RICO statute "sweeps broadly, authorizing '*any* person' who is injured by reason of a RICO violation to sue," 503 U.S. at 278-79 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original), and she would have made clear that "the words 'any person' cannot reasonably be read to mean only purchasers and sellers of securities." *Id.* at 279.

So long as the plaintiff could establish proximate cause, Justice O'Connor would have rejected the effort to narrow the scope of civil RICO, just as the Court had refused to narrow it in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), explaining: "If the defendant engages in a pattern of racketeering activity in a manner forbidden by [§ 1962's] provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional . . . requirement." *Id.* at 495. Justice Scalia also concurred in *Holmes*, and he too would have held that a RICO plaintiff alleging a predicate act of securities fraud need *not* prove it was a purchaser or

seller of the securities in question – but must nevertheless establish proximate cause. *Holmes*, 503 U.S. at 286-87 (Scalia, J., concurring in the judgment).

The consistent theme of the Court and the Justices writing separately in these cases is that although the RICO statute requires a direct relation between the plaintiff's injury and the defendant's racketeering activity, there is no place in the statute for additional elements that would bar a person directly injured by unlawful racketeering activity from pursuing a RICO claim. The same is true for a "reliance" requirement that is divorced from, or in addition to, the statutory requirement of proximate cause.

As the Solicitor General argued recently in a brief for the United States in *Bank of China v. NBM L.L.C.*, No. 03-1559: "Civil RICO requires reliance by someone when the predicate offenses involve fraud in order to establish the requisite causal link between the injury and the RICO violation, but not necessarily reliance *by the plaintiff*. An examination of the language of the statute bears this out." Brief for the United States as *Amicus Curiae* at 21, *Bank of China v. NBM L.L.C.*, 546 U.S. 1026 (2005) (No. 03-1559) (emphasis in original), *available at* 2005 WL 2875061.[10] Noting that § 1964(c) provides a

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[10] This Court granted a petition for certiorari in *Bank of China* to consider a related question of reliance under RICO under different facts. The case involved allegedly false statements made *to the plaintiff*, the Bank of China, and the Second Circuit held that the plaintiff recipient must have reasonably relied on

cause of action for "any person" injured by reason of a violation of § 1962, the Solicitor General argued that "to the extent that a plaintiff can show a 'direct relation' between its injury and misrepresentations directed to a third party, see *Holmes*, 503 U.S. at [269], a rule barring recovery on a third-party reliance theory would be inconsistent with Section 1964(c)'s evidence breadth." *Id.* at 22 (citing *Sedima*, the decision of the Second Circuit in *Anza*, and *Mid Atlantic*).

To be sure, to establish proximate cause in a RICO case involving mail or wire fraud, *someone* typically must have relied upon the false statements at issue. If the false statements were not relied upon by the recipient, it would be difficult to prove that the plaintiff's injuries were proximately caused (or indeed caused at all) by those false statements. But there is no reason under RICO why the false statements need to be received and relied on *by the plaintiff* in every case.

That is precisely the point of the *Mid Atlantic* and *Proctor & Gamble* cases, and it was precisely the point of Judge Easterbrook in his opinion for the

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the statements. *Bank of China v. NBM LLC*, 359 F.3d 171, 178 (2d Cir. 2004) ("Bank of China was required to prove that it reasonably relied on defendants' purported misrepresentations – i.e., the representations that the defendants made *to the Bank* in order to obtain the loans.") (emphasis added), *cert. granted*, 545 U.S. 1138 (2005). Although the issue whether such reliance was required was fully briefed in this Court, the petition for certiorari was dismissed when the case settled. *Bank of China v. NBM L.L.C.*, 546 U.S. 1026 (2005).

Seventh Circuit below. The allegations in this case, properly presumed to be true, are that defendants used the mail and wires to engage in a fraudulent scheme to take business away from the plaintiffs. The County was not harmed, because both plaintiffs and defendants offered the County the same price. Property owners were not harmed, because both plaintiffs and defendants agreed not to impose on them any penalty, i.e., the same 0% rate. *Only* plaintiffs were harmed financially, and only plaintiffs had an economic incentive to sue, by reason of conduct that was the direct and immediate cause of plaintiffs' loss of valuable tax lien properties. To the extent that plaintiffs' financial harm was directly caused by a fraudulent scheme involving use of the mail or wires as part of a pattern of racketeering activity by the defendants, plaintiffs have stated a claim for relief under RICO.

Thus, there is no reason for the Court to consider this case, which is consistent with the Court's proximate cause jurisprudence under RICO and with the decisions of all other circuits to consider the issue, except possibly the Sixth. If the Court ever needs to address the issue of "plaintiff reliance" under RICO, it should do so only if and when a conflicting decision presenting that issue arises from the Sixth Circuit.

3. Third, this case is not an appropriate vehicle to resolve the issue in any event. The Seventh Circuit has ruled only that respondents have stated a claim. Proceedings on remand may develop further the manner in which respondents

themselves relied on petitioners' alleged false statements: for instance, respondents may develop proof that their very decision to participate in the auction, and to incur specific costs in connection with that participation, was made in reliance on the integrity of the allocation process used by the County to award parcels to identically situated bidders. *See, e.g., Living Designs*, 431 F.3d at 363 (reliance by plaintiff adequately based on claims plaintiff "reasonably relied on [DuPont] to obey statutes, court orders, court rules, rules of evidence, written agreements, representations to the court by officers of the court, and representations made under oath to the court by [DuPont]'s officers and agents"); *Chisolm*, 95 F.3d at 339 (allegation that plaintiff relied "on the apparent legitimacy and legality of the operation" sufficient under RICO) (internal citation omitted).

In addition, the overarching issue of proximate cause, and the factors identified by this Court in *Holmes* and *Anza*, also will be further developed. The complaint alleges a fraudulent scheme in which defendants manipulated and inflated the number of tax liens they were able to secure at the direct expense of other, identically situated bidders. Before this Court considers the issues of proximate causation and reliance in this case, further factual development concerning those allegations would be valuable.[11]

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[11] It also is significant that the issue of "reliance" was not the specific focus of the proceedings below, and thus inevitably will

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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be developed further on remand. As noted above, *supra* at 6, the district court ruled that respondents lacked "standing" to sue under RICO. On appeal, petitioners argued that the issue of reliance was "largely academic." *Supra* at 6. Because of the way the issue was presented below, the Court of Appeals principally analyzed this case in terms of *standing* and *proximate cause*, rather than "reliance." See Pet. at 3a-8a. Thus, although the litigation below clearly focused on the fact that respondents had not been recipients of the misrepresentations at issue, there has been minimal consideration of whether respondents nevertheless could prove reliance "qua reliance," to the extent that "reliance" is an independent requirement under RICO.

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November 16, 2007

RESPONDENT'S BRIEF

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No. 07-210

MAR 13 2008 OFFICE OF THE CLERK SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOHN BRIDGE, *ET AL.*,

Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the plaintiff.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

Respondent Phoenix Bond & Indemnity Company has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Respondent BCS Services, Inc. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

Petitioners engaged in a pattern of conduct indictable as mail fraud. That conduct caused a direct, immediate, and certain injury to respondents, and respondents readily can establish proximate cause under the common law and this Court's precedents. On its face, therefore, petitioners' conduct constitutes a plain violation of civil RICO.

Petitioners contend that RICO liability is nevertheless foreclosed because petitioners executed their mail fraud scheme by directing the fraudulent statements at a third party. Citing their understanding of the common law, petitioners contend that such "third-party reliance" is never sufficient for a RICO claim when the predicate acts involve mail fraud. Instead, "first-party reliance," *i.e.*, reliance by the plaintiff, is required.

Petitioners' requirement of first-party reliance is woven from whole cloth. Nothing in the text of RICO mandates that the victim of the scheme rather than the party through whom the defendant operates must rely on the defendants' fraud. RICO provides a cause of action not for "fraud," but instead for acts "indictable" as "mail fraud," and the latter statutory term indisputably covers conduct extending beyond what petitioners contend was actionable at common law. Petitioners' crabbed conception of the common law of fraud — even if it were accurate, and it is not — thus provides no justification for grafting an additional element onto the statute Congress enacted.

The requirement of proximate cause similarly does not impose the limitation petitioners seek. To be sure, reliance by some party is generally required to establish causation — if a mail fraud falls in a forest and no one is there to hear, it is likely that no one will be damaged by the fraud. But third-party reliance can surely provide that requisite causal connection.

There also is no basis for petitioners' contention that, at common law, a plaintiff could establish proximate cause only when the plaintiff personally relied on the fraudulent statement at issue. For nearly 200 years it has been settled that the intended victim may sue when a defendant fraudulently induces a third party to take action that harms the plaintiff, but not the third party. Thus, when a defendant induces a seller by fraud to take goods set aside for the plaintiff and to sell those goods to the defendant instead, the defendant is liable to the plaintiff for its fraud at common law. Nothing in the mail fraud statute or in RICO narrows the common law's reach.

Moreover, this Court already has explained in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), how to analyze the directness requirement that proximate cause imposes on RICO mail fraud claims, and petitioners do not (and cannot) dispute that respondents have established proximate cause under that analysis.

Petitioners are thus left to conjure a parade of horribles to justify their novel proximate cause

restriction. Their concerns are unmoored from the statute, the common law, and this Court's precedent. But even if this Court rather than Congress were the appropriate forum for petitioners' concerns, petitioners' floodgates arguments ignore that *Holmes* and *Anza* already restrain the scope of claims that can reasonably satisfy the requirement of proximate cause. Moreover, the first-party reliance restriction petitioners urge is arbitrary. Adopting the restriction might limit RICO claims, but only in a manner divorced from the common law and tailored not at all to the harms that Congress addressed in RICO.

STATEMENT OF THE CASE

This case involves petitioners' scheme to obtain by fraud a vastly disproportionate share of valuable tax liens that are the core of respondents' business.

A. Cook County's Annual Tax Sale.

Petitioners' scheme is set forth in detailed allegations in respondents' complaint, all of which must be taken as true for this appeal. Petitioners' fraud affected the sale of tax liens on property located in Cook County, Illinois. The tax liens arise when a property owner fails to pay required real estate taxes to the County. Pet. App. 1a. Instead of pursuing its rights as the holder of the tax liens, the County annually sells tens of thousands of the liens to private "tax buyers" such as petitioners and respondents. *Id.* at 1a, 10a.

Although denominated an "Annual Tax Sale," the County in fact distributes liens through a system

described by Chief Judge Easterbrook as "allocation by lot," Pet. App. 2a, under which the County ensures a fair apportionment of liens by allocating them to willing and qualified tax buyers on a "rotational basis." JA 17-18 (Compl. ¶ 36). The process works as follows. *See generally* Pet. App. 1a-3a (describing process); JA 16-22 (Compl. ¶¶ 32-51) (same). A tax buyer who acquires a lien must pay the County the taxes due. The owner of the property then has the opportunity to redeem the lien by paying both the outstanding taxes and a statutory penalty assessed upon the property owner, up to a maximum of 18%. Pet. App. 1a-2a.

At the tax sale, tax buyers identify the penalty that will be imposed upon the property owner to redeem the lien. The tax buyer willing to accept the *lowest* penalty is awarded the tax lien. Pet. App. 1a-2a. The new lien holder then may assert its rights under the lien. If the property owner pays the back taxes and statutory penalty (in the amount established at the tax sale), the property owner retains the property. If the property owner does not pay within a specified period (two to three years), the lien holder may obtain a tax deed and become the parcel's new owner. *Id.* at 1a.

Because the parcels at issue almost always have economic value beyond the amount of the unpaid taxes, the vast majority of parcels at the County's tax sale attract multiple tax buyers willing to accept a 0% penalty. *Id.* at 2a; JA 17-18 (Compl. ¶ 36). Tax buyers thus do not expect to make their money by collecting penalties from property owners for taxes

that have accrued at the time of the sale. Instead, tax buyers can profit in two ways: first, they collect a 12% penalty on any additional real estate taxes that accrue *after* the sale and that the property owner must pay to redeem the lien on the property; and second, tax buyers can resell the properties of owners who do not redeem the lien. *Id.* at 18 (Compl. ¶ 38). As Chief Judge Easterbrook noted, from the County's perspective, the fact that tax buyers are willing to purchase liens and accept a 0% penalty on existing unpaid taxes "is all to the good: [the County] recovers the taxes, and owners need not pay extra." Pet. App. 2a.

The principal problem facing the County is how to distribute the tens of thousands of liens to the qualified tax buyers willing to purchase them for the same 0% penalty. *Id.*[1] The County does not allow tax buyers to offer a "negative" penalty; as Chief Judge Easterbrook observed, if a negative penalty were imposed, delinquent property owners would actually be better off by not paying their taxes at the originally assessed full value. *Id.* at 2a. The County, instead, ensures a fair apportionment of liens by awarding parcels among identical 0% tax buyers on a rotational basis, so that tax buyers receive parcels "according to the ratio of their bids to other identical bids." Pet. App. 2a.

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[1] In order to prevent collusion among tax buyers — *i.e.*, to prevent buyers from all offering to accept only a statutory penalty above 0% — the County will not sell a tax lien when the lowest penalty rate bid by multiple buyers is above 0%.

The use of the rotational apportionment system leaves the tax sale process open to manipulation by a tax buyer who sends multiple agents to the annual sale to garner a disproportionate number of "entries" in the rotation. *See* Pet. App. 2a. The County thus places restrictions to ensure that each tax buyer is an independent entity, thereby protecting other bidders and ensuring a fair apportionment of liens, as the County intends.

As part of its registration submission, for example, each tax buyer must attest to its compliance with the so-called "Single, Simultaneous Bidder Rule," which prohibits a tax buyer from having "related entities" submit separate registrations "for the intended or perceived purpose of having more than one person bidding at the tax sale at the same time for the intended or perceived purpose of increasing the principal's likelihood of obtaining a successful bid on a parcel." JA 67 (Compl. Ex. A) (emphasis in original).

In addition, beginning in 2004, each tax buyer was required to "represent and warrant" "under oath or affirmation" that it is truly independent from other tax buyers. Thus, a tax buyer attests (among other things) that it (A) "has no capital, purchase money, or other finances in common" with other buyers; (B) "shares no common ownership interest or common source of funds" with other buyers; and (C) "has no agreements to purchase or sell any parcels" obtained by other tax buyers. JA 21 (Compl. ¶ 50); JA 65-66 (Compl. Ex. A). Making these "representations and warranties" and affirming

compliance with the Single, Simultaneous Bidder Rule are prerequisites to a buyer's participation in the tax sale. Pet. App. 2a; JA 21 (Compl. ¶ 48).

B. Petitioners' Scheme.

Petitioners are tax buyers who created an enterprise to obtain by fraud a vastly disproportionate share of tax liens at Cook County annual tax sales in 2002-2005. Petitioners all completed registrations, swearing on penalty of perjury that they complied with the County's related entity restrictions: petitioners made the required representations and warranties and affirmed compliance with the Single, Simultaneous Bidder Rule. Petitioners' sworn statements, however, were false.

Led by Sabre Group, LLC and its principals Barrett Rochman and John Bridge, petitioners arranged to pack the tax sale room. Bridge and Rochman arranged for the formation of numerous tax buyers (collectively, the "Related Entities"). Many of the Related Entities were headed by relatives of Bridge or Rochman: Bridge's brother was a principal in one, and his nephew was a principal in two others, JA 13, 14, 16 (Compl. ¶¶ 10, 11, 19, 28, 29), and Rochman's sons and other relatives headed still other Related Entities, JA 14-15 (Compl. ¶¶ 16, 22-25). Bridge and Rochman directed the Related Entities to register for the tax sales and to provide the fraudulent statements that concealed from the County and from other buyers their connection to Sabre. The Related Entities received thousands of liens at 0% penalty under the

rotational apportionment system. Pursuant to prior agreement between Sabre and the Related Entities, the various tax buyers within the Sabre enterprise then transferred all of their liens to Sabre shortly after the conclusion of the tax sales. JA 24-32, 34-41 (Compl. ¶¶ 59-63, 68-73, 78-89, 93-94).

The only victims of petitioners' scheme were rival tax buyers who were defrauded out of their fair share of liens. The County suffered no financial harm, because the tax obligations on all liens were paid in full. And the property owners suffered no financial harm, because the penalty on the tax liens was 0%, the minimum allowed by law. Only the other tax buyers lost liens and the related profit from those liens they otherwise would have obtained.

C. Proceedings Below.

Respondents Phoenix Bond & Indemnity Co. and BCS Services, Inc. are two tax buyers who were directly injured by petitioners' scheme. At each of the tax sales in question, respondents obtained hundreds of liens from the County with a 0% penalty under the rotational apportionment system. But respondents were deprived of many hundreds of additional liens they would have received under that system, but did not because of petitioners' fraud.

In July 2005, respondents filed suit in the United States District Court for the Northern District of Illinois seeking to hold petitioners responsible under RICO for their fraud. Respondents alleged predicate violations of the mail fraud statute, asserting that petitioners had caused the mails to be used in furtherance of their scheme when the County mailed

scores of notices to property owners, which are legally required for tax buyers such as petitioners to realize the value of the tax liens they acquire. Pet. App. 3a, 12a (describing relevant mailings); *see also* JA 19-20 (Compl. ¶¶ 40-42) (same).

The District Court granted petitioners' motion to dismiss. Pet. App. 9a. The court recognized that "only the plaintiffs and other competing buyers, as opposed to the Treasurer or the property owners, would suffer a financial loss" from petitioners' scheme. Pet. App. 17a. Nevertheless, the court found it significant that "the misrepresentations were made to the Treasurer and the mailings were sent to the property owners." *Id.* at 18a. Thus, although noting it was a "close question," the District Court concluded that respondents lacked standing, because they "were not recipients of the alleged misrepresentations and, at best were indirect victims of the alleged fraud." *Id.*[2] Respondents timely appealed.

In a unanimous opinion written by Chief Judge Easterbrook and joined by Judges Posner and Evans, the Seventh Circuit reversed. Pet. App. 1a. Chief Judge Easterbrook made quick work of petitioners' standing argument, noting that petitioners' conduct

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[2] Respondents also alleged a state law claim of tortious interference with prospective business advantage. Once it had dismissed the RICO claim, the District Court declined to exercise supplemental jurisdiction over the state law claim and dismissed that claim without prejudice. Pet. App. 18a. Petitioners have challenged the sufficiency of the claim under state law.

caused "an actual (and substantial) reduction in the number of liens [respondents] take away," and that respondents' injury could be redressed by damages. *Id.* at 3a-4a.

The court then addressed the issue of proximate cause. Chief Judge Easterbrook noted that the framework established in this Court's decisions in *Holmes* and *Anza* "poses a set of questions" to inform the proximate cause inquiry: "Is someone else a distinctly better enforcer? Does the presence of intermediate parties make it too hard to calculate damages — or create a risk that recovery by this plaintiff will come at the expense of someone with a better claim?" Pet. App. 4a.

Answering those questions, Chief Judge Easterbrook noted, led inexorably to the conclusion that the requirements of proximate cause were satisfied. Thus, although petitioners maintained that Cook County was the victim of their fraud, "Cook County did not lose even a penny: each winning bidder always pays all back taxes and interest. . . . The *only* injured parties are the losing bidders, who acquire fewer tax liens than they would if the Single, Simultaneous Bidder Rule were followed." Pet. App. 5a (emphasis in original). The court noted that the County doubtless could enforce its own rule, but it had no financial incentive to do so. *Id.* at 6a. Moreover, "[i]f a government's ability to penalize fraud knocked out private litigation, then [RICO's private right of action] would no longer apply when the predicate act is fraud, for

governments always have some ability to detect and penalize frauds." *Id.* at 6a-7a.

Chief Judge Easterbrook also rejected petitioners' argument that respondents could not sue because no false statements were made to them. *Id.* at 7a. Citing Seventh Circuit precedent, as well as case law such as Chief Judge Boudin's opinion for the First Circuit in *Systems Management, Inc. v. Loiselle*, 303 F.3d 100 (1st Cir. 2002), the Court of Appeals held that "the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements." Pet. App. 7a. (emphasis in original). Thus, "[a] scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's." *Id.* Because respondents' injury was "direct rather than derivative," and "the injury satisfies the requirements of *Holmes* and *Anza*," respondents were entitled to an opportunity to prove their claims at trial. *Id.* at 8a.

Nor did the Court of Appeals find persuasive petitioners' argument that respondents were outside the "zone of interests" protected by the mail fraud statute. *Id.* Because respondents were a direct victim of petitioners' fraudulent scheme (even though not a direct recipient of the false statements), the court found respondents to be within the zone of persons the mail fraud statute was designed to protect. Thus, the court concluded that the zone-of-interests argument here was "just a different take on the proposition that only recipients of the untruth

have a remedy" under RICO based on mail fraud, which the court had rejected. *Id.*

D. Subsequent District Court Proceedings.

Following remand from the Seventh Circuit, respondents filed two amended complaints with the District Court. *See* Corrected Second Amended Complaint and Demand for Jury Trial. (D.E. 214) ("Amended Complaint"). In addition to including substantial evidence of the fraud at issue gathered during discovery, the Amended Complaint alleges that petitioners generally had multiple buyers simultaneously pursuing the same liens. The Amended Complaint also specifically identifies the thousands of liens from each annual tax sale during the period 2002-2005 on which respondents offered a 0% penalty, but which the County awarded to petitioners under the (distorted) rotational apportionment system. *See* Amended Complaint ¶¶ 72, 86, 115, 131 & Exs. B1, B2, B3, B4 (D.E. 214).[3]

Following the grant of certiorari, the defendants sought, and the District Court granted, a stay of proceedings pending this Court's decision.

SUMMARY OF ARGUMENT

Petitioners' lead argument, that reliance is a freestanding element of a civil RICO claim

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[3] Although beside the point for present purposes, petitioners are thus incorrect to contend that respondents have failed to "identify any properties on which the defendants simultaneously bid and on which the plaintiffs also bid and lost." Petr. Br. 11.

predicated on mail fraud, is untenable. Petitioners concede that neither the mail fraud statute nor RICO itself contains an express reliance requirement. Petitioners maintain, nevertheless, that civil RICO claims predicated on mail fraud must allege the elements of a common law civil fraud action, including (in their view) reliance by the plaintiff. Even if petitioners were correct about what the common law requires — and they are not — the argument fails at a more basic level. Nothing in the text or structure of RICO requires a plaintiff to prove the elements of common law fraud. RICO has its own elements, including the commission of a pattern of "indictable" criminal activity. A civil RICO claim cannot be predicated on common law fraud, and nothing in RICO transforms a claim predicated on indictable mail fraud, which does not require proof of reliance, into a claim for common law civil fraud.

Nor are petitioners correct in their second argument, that proximate cause may exist in a RICO mail fraud case only if the *plaintiff* receives the falsehoods at issue and personally relies on those misstatements. To be sure, RICO's proximate cause requirement generally will require proof that someone relied on the falsehoods. The common law has long recognized, however, that frauds may occur in many ways. And in cases dating back to the birth of the Nation, courts have upheld claims for damages based on fraud where the defendant made a false statement to a third party that directly caused injury to the plaintiff. This principle of "third-party reliance" is well-established in the Restatement of Torts, on which petitioners heavily rely. In addition

to claims for misrepresentation that may be brought by the *recipient* of a false statement (on which the recipient must justifiably rely), the Restatement recognizes that claims for "injurious falsehoods" may be brought where the defendant makes false statements to a third party, and that claims for wrongful interference may lie where the defendant "induc[es] a third person by fraudulent misrepresentation not to do business with the other." *Restatement (Second) of Torts* § 767 cmt. c, at 30 (1979). The common law has never limited the actionability of fraud to instances of "first-party reliance."

This Court already has identified in *Holmes* and *Anza* the factors governing the proximate cause analysis in RICO cases, and, although petitioners did not seek review of the Court of Appeals' application of those factors, the Court of Appeals' analysis is plainly correct. First, the entirety of respondents' injury is attributable to petitioners' fraud as "distinct from other, independent factors." *Holmes*, 503 U.S. at 269; *Anza*, 547 U.S. at 458. Second, there is no "appreciable risk of duplicative recoveries" among plaintiffs "removed at different levels of injury from the violative acts." *Holmes*, 503 U.S. at 269. And third, because the County did not lose "even a penny" by reason of petitioners' fraudulent scheme, there is no distinctly better plaintiff in this case that can be "counted on to vindicate the law as private attorneys general." *Holmes*, 503 U.S. at 258; *Anza*, 547 U.S. at 460. Petitioners' scheme was intended to have an effect *only* when neither the County nor property owners could be harmed, and when the only issue

was how valuable tax liens would be allocated among identical tax buyers willing to accept a 0% penalty.

Faced with statutory text and precedent that foreclose their position, petitioners and their *amici* resort to practical considerations and raw policy arguments. But petitioners' practical concerns are hyperbole, and their policy arguments are both misguided and directed to the wrong forum. There is no risk that affirming the decision of the Court of Appeals will create an avalanche of RICO claims: the reality is that RICO claims are and will continue to be a tiny percentage (far less than 1%) of the federal docket. This Court's proximate cause requirements as set forth in *Holmes* and *Anza* will continue to preserve RICO only for plaintiffs directly injured by predicate acts of racketeering activity, such as respondents here. There is thus no reason to be concerned about a potential for misuse of RICO claims predicated on mail fraud. In any event, as this Court previously has emphasized, such concerns are properly addressed to Congress.

As Congress made clear in creating an express private right of action for those injured in their "business or property," RICO was intended to combat the "illegal use of force, fraud and corruption" against "competing organizations." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (Statement of Findings and Purposes). Because respondents were directly injured by petitioners' fraudulent scheme, the decision of the Court of Appeals is correct and should be affirmed.

ARGUMENT

The issues here are starkly presented. As part of a scheme designed and intended to take business from respondents and other tax buyers by fraud, petitioners falsely swore to the County that they complied with the County's related entity restrictions. The County relied on those representations: absent the false statements, petitioners would not have been allowed to participate in the annual tax sales. Because of their participation in the sales and the scheme they employed to pack the room with related entities, petitioners acquired liens that they would not have acquired otherwise, and that would have been assigned to respondents and other tax buyers under the County's rotational apportionment system. To effectuate this scheme, petitioners caused the mails to be used when property owners were sent the required notices. And, finally, only respondents and other tax buyers, and not the County or property owners, suffered financial harm from this fraud.

The question thus presented is whether respondents — the direct and immediate victims of petitioners' mail fraud scheme — are nonetheless barred from pursuing a civil RICO claim merely because a third party, and not respondents, received and relied upon the fraudulent statements. The text of RICO, ample precedent from this Court and from the common law, and policy considerations all make clear that there is no bar to respondents' claims.

I. RELIANCE IS NOT AN ELEMENT OF A RICO CLAIM.

Petitioners' lead argument is that reliance is a freestanding "element" of a civil RICO claim predicated on mail fraud. Petr. Br. 18. According to petitioners, such RICO claims are effectively claims for common law civil fraud, which they contend includes a first-party reliance element. Petr. Br. 16-22. Petitioners are wrong about what the common law requires — third-party reliance of the type alleged here has been sufficient at common law for centuries. *See infra* Part II. But RICO's text, structure, and purpose refute petitioners' claims at a more fundamental level. RICO is not the equivalent of civil common law fraud, but is instead a federal law triggered by the commission of defined predicate acts, including mail fraud, and neither the mail fraud statute nor RICO itself contains a reliance element. To be sure, RICO requires that civil plaintiffs demonstrate proximate causation, which "in the general case" will require some showing of reliance. *Anza*, 547 U.S. at 478 (Thomas, J., concurring in part and dissenting in part). But Congress left "no room in the statutory language for an additional" reliance element — let alone the first-person reliance requirement advocated by petitioners — and thus this Court should not craft such an element of its own accord. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985).

A. Statutory Background.

In rebutting petitioners' claim that first-party reliance is an element of RICO, it is helpful to begin

with RICO's statutory structure. Congress drafted RICO as "an aggressive initiative to supplement old remedies and develop new remedies for fighting crime." *Sedima*, 473 U.S. at 498. Faced with a "new situation in which persons engaged in long-term criminal activity often operate[d] wholly within legitimate enterprises," *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989), and believing that "existing law . . . was not adequate" to address the problem, *United States v. Turkette*, 452 U.S. 576, 586 (1981), Congress used "self-consciously expansive language" to "attack[] crime on all fronts." *Sedima*, 473 U.S. at 498.

To this end, RICO makes it unlawful for a person (including a corporation) to conduct the affairs of an enterprise through a "pattern of racketeering activity" under certain circumstances. 18 U.S.C. § 1962(c). A pattern of racketeering activity, in turn, is established where the defendant commits "at least two acts of racketeering activity." 18 U.S.C. § 1961(5). These acts include, among other things, "any act which is indictable" as one of dozens of federal crimes, including mail fraud. 18 U.S.C. § 1961(1)(B).

RICO contains multiple enforcement provisions to punish violators. In addition to providing for criminal penalties, 18 U.S.C. § 1963, and civil enforcement by the Attorney General, 18 U.S.C. § 1964(b), RICO contains an express private right of action for persons injured "by reason of" a RICO violation. 18 U.S.C. § 1964(c). Thus, although a violation of RICO can be redressed in a civil action,

what is redressed is not a violation of a civil law, but a violation of RICO — a criminal statute that prohibits the commission of a pattern of acts indictable as specified state or federal crimes. As discussed in more detail below, petitioners misunderstand this when they argue that RICO requires a plaintiff to show a violation of common law civil fraud to prevail on a RICO claim based on predicate acts indictable as mail fraud.

B. Neither The Mail Fraud Statute Nor RICO Contains A Reliance Element.

As petitioners concede, neither the mail fraud statute nor RICO contains an express reliance requirement. By its terms, the mail fraud statute contains no reliance requirement and, in *Neder v. United States*, this Court affirmed that "[t]he common-law requirement[] of 'justifiable reliance' . . . plainly ha[s] no place in the federal fraud statutes." 527 U.S. 1, 24-25 (1999) (citing *United States v. Stewart*, 872 F.2d 957, 960 (10th Cir. 1989)). *See Anza*, 547 U.S. at 476 (Thomas, J., concurring in part and dissenting in part).[4] Likewise, there is no free-

[4] Although petitioners suggest that respondents have not adequately pleaded a mail fraud violation because the false statements in question were not mailed, Petr. Br. 8, 36, or because the County rather than petitioners undertook the mailings, *id.* at 8, that is incorrect. It is settled law "that 'innocent' mailings — ones that contain no false information — may supply the mailing element [of 18 U.S.C. § 1341]." *Schmuck v. United States*, 489 U.S. 705, 715 (1989) (citing *Parr v. United States*, 363 U.S. 370 (1960)). Likewise, a defendant may commit mail fraud even where the defendant does not use the mails itself: the statute requires only that the defendant "cause[]" the mails to be used. 18 U.S.C. § 1341. And "[w]here

standing reliance requirement in RICO's text. Congress articulated the elements of a RICO violation (*e.g.*, commission of defined predicate acts, engaging in a pattern of racketeering), but reliance is not one of them. *Cf. NOW v. Scheidler*, 510 U.S. 249, 257 (1994) ("Nowhere in either § 1962(c) or the RICO definitions in § 1961 is there any indication that an economic motive is required.").

Petitioners nevertheless contend that a reliance requirement should be read into the statute "under governing common law principles." Petr. Br. 16. Under petitioners' view, when a RICO violation is redressed through a civil action, the elements of the claim are transmuted: "pleading a violation of the criminal mail fraud statute is not sufficient to establish a predicate act." *Id.* at 17. Instead, a civil RICO plaintiff must satisfy the elements of the "common law of civil fraud" to establish a RICO violation. *Id.* at 18.

This argument is based on a confused and incorrect reading of the statute. A claim for damages under civil RICO, like any other means of enforcing RICO, requires a "violation" of RICO. 18 U.S.C.

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one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *Pererira v. United States*, 347 U.S. 1, 8-9 (1954). Here, petitioners prepared notices and provided them to the County so the County would mail them "in the ordinary course of business" to inform the delinquent taxpayers that petitioners had (unlawfully) acquired liens on their property. JA 19-20 (Compl. ¶¶ 40-42). That is all the mail fraud statute requires.

§ 1964(c). And Congress has provided that mail fraud, and not common law fraud, serves as a predicate act for a RICO violation. Indeed, if respondents had alleged common law fraud as a predicate act, they would not have stated a claim under RICO. *Cf. Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1422 (3d Cir. 1991) ("[RICO] equates 'racketeering activity' with the predicate offenses.") (Alito, J., concurring).

Nor is it plausible to contend that "mail fraud" takes on additional elements drawn from the common law when it serves as a predicate act in a civil RICO claim. RICO defines a predicate act as "any act *indictable* under . . . 18 U.S.C. § 1341." 18 U.S.C. § 1961(1)(B) (emphasis added). Congress' use of the word "indictable" makes plain that a predicate act exists where (and only where) the requirements for a *criminal* mail fraud prosecution are satisfied. As Justice Thomas put it, "[b]ecause an individual can commit an indictable act of mail or wire fraud even if no one relies on his fraud, he can engage in a pattern of racketeering activity, in violation of § 1962, without proof of reliance." *Anza*, 547 U.S. at 476 (Thomas, J., concurring in part and dissenting in part).

Part of petitioners' error stems from a mistaken reading of *Neder*. As noted above, *Neder* held that the mail fraud statute could be violated without a showing of reliance. *Neder* specifically stated that although reliance was required in civil common law fraud actions, the mail fraud statute did not incorporate this requirement. *Neder*, 527 U.S. at 22.

Petitioners extrapolate from this statement that when mail fraud is part of a civil RICO claim, civil common law elements control. Petr. Br. 17-19. But RICO does not authorize claims for common law fraud. Instead, as Chief Judge Boudin explained, "Congress structured its civil remedy to allow recovery for harm caused by defined *criminal* acts . . . and . . . the federal mail fraud statute does not require reliance." *Loiselle*, 303 F.3d at 104 (emphasis added). This Court already has decided that common law reliance is not necessary to make mail fraud indictable, and nothing in RICO authorizes a return trip to the common law to impose additional elements. Put simply, RICO takes its predicate acts as it finds them.

To be sure, a showing of reliance by someone — though not necessarily the plaintiff — will generally be necessary to show proximate cause, which is a requirement that RICO imposes in all civil damages cases, regardless of the predicate act. *See infra.* "But the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action." *Anza*, 547 U.S. at 478 (Thomas, J., concurring in part and dissenting in part). Reliance may be relevant to the proximate cause inquiry, but it is not an independent element of a RICO claim. *See Loiselle*, 303 F.3d at 104 (refusing to "import" any reliance requirement into the RICO statute, and instead finding proximate cause sufficient "to shape and delimit" liability).

Justice Thomas' opinion for the Court in *Beck v. Prupis*, 529 U.S. 494 (2000), is not to the contrary. In that case, the plaintiff alleged that the defendants had committed a conspiracy to violate RICO, and this Court was asked to determine what it meant for a civil RICO plaintiff to be injured by reason of a "conspiracy" to violate RICO. *Id.* at 500. RICO does not define the term "conspiracy," and this Court reasoned that Congress intended the phrase "injured by reason of a conspiracy" to carry its "settled" common law meaning. *Id.* While it was appropriate for the Court to look to the common law to flesh out a term — conspiracy — that RICO does not define and that had a definite meaning at common law, that approach does not aid petitioners because RICO *does* define its predicate acts: they include, as relevant here, acts "indictable" as "mail fraud." For the reasons described above, RICO's text and structure preclude reverting back to the civil common law to graft additional elements onto the mail fraud statute.

Ultimately, petitioners ask this Court not to read RICO in light of the common law, but to rewrite the statute. This Court has consistently refused to ignore RICO's text and to impose restrictions that Congress did not legislate. *E.g., Turkette*, 452 U.S. at 580 (declining to limit RICO to violations by "legitimate" enterprises because "on its face" RICO's definition of "enterprise" contained no such limitation); *Sedima*, 473 U.S. at 493-95 (holding that RICO's civil provisions were not limited to defendants who had already been criminally convicted, and that RICO plaintiffs need not allege a special "racketeering"

injury, because neither limitation was present in the text of the statute); *H.J. Inc.*, 492 U.S. at 243-44 (holding that RICO patterns were not limited to acts "characteristic of organized crime" because "such a limitation . . . finds no support in the Act's text"); *NOW*, 510 U.S. at 257 (holding that civil RICO suits were not limited to racketeering motivated by an economic purpose because "nowhere in [RICO] is there any indication that an economic motive is required"); *see also Anza*, 547 U.S. at 478 (Thomas, J. concurring in part and dissenting in part). The same result is required here: this Court should reject petitioners' invitation to hold that reliance is a free-standing element of a civil RICO claim based on mail fraud.

II. RELIANCE BY THE PLAINTIFF IS NOT NECESSARY TO ESTABLISH PROXIMATE CAUSE FOR A RICO CLAIM PREDICATED ON MAIL FRAUD.

Having failed to establish that reliance by the plaintiff is a free-standing element of RICO, petitioners shift gears and argue that first-party reliance is incorporated into the statutory scheme as an indispensable element of § 1964(c)'s requirement of proximate cause. Respondents do not deny, of course, that reliance is often relevant to the proximate cause analysis; indeed, it generally will be impossible to establish even but-for causation without reliance by someone. As Justice Thomas observed, the fact that reliance is not an element of the offense "is not to say that, in the general case, a plaintiff will not have to prove that someone relied

on the predicate act of fraud as part of his case." *Anza*, 547 U.S. at 478.

That is no help to petitioners, however, because respondents' complaint amply alleges such reliance — the County relied on petitioners' fraudulent statements. Absent petitioners' fraud, the County would have barred petitioners from the tax sales, and it certainly would not have counted petitioners separately in allocating properties among tax buyers willing to accept a 0% penalty. To prevail, therefore, petitioners must go further: not only is reliance required in every case to establish proximate cause, but that reliance must be *by the plaintiff*. Petr. Br. 28 (contending that proximate cause can be established "only where the plaintiff can demonstrate that he relied on the misrepresentation").

There is no basis for petitioners' first-party reliance requirement. Centuries of cases from the common law as well as this Court's teachings on proximate cause refute petitioners' unyielding rule. As the Seventh Circuit correctly held, a defendant's mail fraud can proximately cause injury even in the absence of reliance by the plaintiff where, as here, the plaintiff was directly and intentionally injured by the defendant's scheme, the plaintiff's damages were entirely attributable to the defendant's conduct and there are no intermediate parties with whom damages would need to be apportioned, and there is no distinctly better enforcer to bring a RICO claim to hold the defendant accountable for its fraud.

A. "Plaintiff" Reliance Is Not Required For Common Law Fraud Claims.

1. Proximate cause is "causation substantial enough and close enough to the harm to be recognized by law." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004). To define proximate cause in the context of RICO, this Court in *Holmes* and again in *Anza* "turned to the common-law foundations of the proximate cause requirement, and specifically the demand for some direct relation between the injury asserted and the injurious conduct alleged." *See Anza*, 547 U.S. at 547 (internal quotation marks omitted).

There is little doubt that the claims here satisfy any demand for directness in the common law. Indeed, common law fraud jurisprudence abounds with cases in which defendants were held liable for fraud to plaintiffs who did not receive or rely on the fraud or deception, but who were directly injured by it. Lack of reliance *by the plaintiff* on defendants' fraudulent statements poses no bar to relief in such cases.

In *Rice v. Manley*, 66 N.Y. 82 (1876), for example, plaintiffs had entered into an agreement with a third party vendor to purchase "a large quantity of cheese, to be delivered at a future day." *Id.* at 83. Defendant, in an effort to obtain the cheese for himself, falsely represented to the vendor that plaintiffs no longer wished to purchase the cheese, and thereby induced the vendor to sell the cheese to defendant rather than to plaintiff. *Id.* at 84. Relying

on a string of earlier cases, the New York Court of Appeals upheld a fraud verdict in favor of plaintiff:

> The mere forms adopted for the perpetration of frauds are of little importance; it matters not whether the false representations be made to the party injured or to a third party, whose conduct is thus influenced to produce the injury, or whether it be direct or indirect in its consequences. Schemes of fraud may be so cunningly devised as to elude the eye of justice, but they must not escape condemnation and reparation when discovered.

Id. at 87.

Rice v. Manley relied in part on the New York trial court decision in *Benton v. Pratt*, 2 Wend. 385 (N.Y. Sup. Ct. 1829). There, plaintiff, a hog farmer, brought a fraud claim against defendant, a competing hog farmer, for falsely representing to certain of plaintiff's customers that plaintiff had abandoned his intention to sell and deliver his hogs to them. Relying on this fraudulent representation, plaintiff's customers agreed to purchase defendant's hogs instead. *Id.* at 385-86. Even though the fraud was directed to a third party, the court found "an unqualified falsehood, with a fraudulent intent as to a present or existing fact, and a direct, positive and material injury resulting therefrom to the plaintiff," and held that "[t]his is sufficient to sustain the action." *Id.* at 390.

To the same effect is *Gregory v. Brooks*, 35 Conn. 437 (1868). There, the plaintiff wharf owner alleged

that defendant, in order to deprive the plaintiff of business, had fraudulently represented himself to be a superintendent of wharves and, in that capacity, had ordered the captain of a vessel unloading at plaintiff's wharf to move therefrom. The court sustained the action, emphasizing that "the cases are numerous where injuries have been holden actionable although not directly committed upon the plaintiff in the case, if they were intended to affect and did injuriously affect him in his contract or business relations." *Id.* at 446; *see also id.* at 447-48 ("[A]lthough the representations and order are alleged to have been made to the captain of the vessel as occupant of the wharf, they are not alleged to have been made with any design to injure him, or any other design than to injure the plaintiff."). The common law is rife with similar cases.[5]

Nor is the sufficiency of third-party reliance merely a relic of a bygone era. For example, in *Buxton Manufacturing Co. v. Valiant Moving & Storage, Inc.*, 239 A.D.2d 452 (N.Y. App. Div. 1997), plaintiff brought an action for fraud based on defendant's false certification to the Department of Agriculture that all subcontractors and suppliers on a project had been paid. Plaintiff, a supplier, alleged that without defendant's false certification, the government would not have paid the defendant in

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[5] *See, e.g., Yates v. Joyce*, 11 Johns. 136 (N.Y. Sup. Ct. 1814); *Adams v. Paige*, 24 Mass. 542 (1829); *Green v. Button*, 2 C. M. & R. 707, 150 Eng. Rep. 300 (Ex. 1835); *Marsh v. Billings*, 61 Mass. 322 (1851); *Snow v. Judson*, 38 Barb. 210 (N.Y. Sup. Ct. 1862); *Hughes v. McDonough*, 43 N.J.L. 459 (N.J. 1881); *Lewis v. Corbin*, 81 N.E. 248 (Mass. 1907).

full, but would have withheld an amount sufficient to pay plaintiff's outstanding claim. The court sustained the claim for fraud, explaining:

> It is generally the case that a cause of action to recover damages for fraud requires, *inter alia*, a showing that a false representation was made to the injured party, for the purpose of inducing reliance thereon, and reasonable reliance by the injured party. Fraud, however, may also exist where a false representation is made to a third party, resulting in injury to the plaintiff.

Id. at 453-54 (citations omitted); *see also, e.g.*, *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, Civ. A. No. 01-12257-PBS, 2007 WL 1051642, at *13 (D. Mass. Apr. 2, 2007) ("Third party reliance on fraud is also cognizable under New York law where there is a sufficient causal connection between a defendant's fraud and a plaintiff's injury."); *N.B. Garments (PVT) Ltd. v. Kids Int'l Corp.*, No. 03 CN. 8041 (HB) 2004 WL 444555, at 3 n.5 (S.D.N.Y. Mar. 10, 2004) (same).[6]

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[6] To be sure, and as discussed in *In re Pharmaceutical Industry* and *N.B. Garments*, there are decisions espousing the principle that fraud requires reliance by the plaintiff (including cases cited by petitioners and their *amici*), but those decisions overlook the longer line of cases accepting third-party reliance in cases such as the one here. The more important point, moreover, discussed *infra*, is that the common law has come to differentiate various types of fraudulent conduct, and there is no question that the common law continues to recognize claims for damages based on false statements made to third parties that directly injure the plaintiff.

2. Ignoring this abundant case law, petitioners and their *amici* turn to the Restatement to try to bolster their claim that "a civil plaintiff may recover for fraud 'if, but only if, he relies on the misrepresentation in acting or refraining from action and his reliance is justifiable.'" Petr. Br. 22 (quoting *Restatement (Second) of Torts* § 537 (1977)). But petitioners omit the critical portion of the Restatement section on which they rely. The full provision reads: "The *recipient* of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if, but only if, (a) he relies on the misrepresentation in acting or refraining from action, and (b) his reliance is justifiable." *Restatement (Second) of Torts* § 537 (1977) (emphasis added). In many — perhaps most — cases of fraud, it is the *recipient* of the misrepresentation that is harmed by its falsity, and the Restatement reasonably requires that before the *recipient* can recover for pecuniary loss, the recipient must establish that he or she justifiably relied on the misrepresentation.

But there is nothing in the Restatement that suggests that frauds can be perpetrated *only* against the recipient of a misstatement. Rather, the Restatement recognizes, consistent with the long line of cases reviewed above, that frauds can occur in many ways, some of which involve falsehoods directed at third parties. Some of these frauds, in the classification of the Restatement, have acquired specialized labels as the law of torts has developed, but they are frauds just the same. Thus, the Restatement recognizes the fraud of "injurious

falsehood," which involves the publication (in the broad sense of the word) of "a false statement harmful to the interests of another." *Restatement (Second) of Torts* § 623A (1977). The comments explain that "[t]he general principle stated in this Section is applied chiefly in cases of the disparagement of property in land, chattels or intangible things or of their quality," although the rule "is equally applicable to other publications of false statements that do harm to interests of another having pecuniary value and so result in pecuniary loss." *Id.* cmt. a. The comments provide a series of illustrations, all of which involve false statements made to a third party (including government authorities). *Id.*

Similarly, the Restatement recognizes a tort where one "intentionally and improperly interferes with another's prospective contractual relation," *Restatement (Second) of Torts* § 766B (1979), and it emphasizes that this tort can arise where the defendant "induc[es] a third person by fraudulent misrepresentation not to do business with the other," *id.* § 767, cmt. c. Indeed, the Restatement recognizes that liability exists for one who intentionally causes injury to another through any conduct that is culpable (such as "by telling a known falsehood") and not justifiable, *id.* § 870 and § 870, cmt. h, including "where a person defrauds another for the purpose of causing pecuniary harm to a third person," *Restatement (Second) of Torts* § 435A, cmt. a (1965) (citing § 870).

Accepting the principle of third-party reliance does not mean that all state law business torts suddenly become "federalized" and are somehow actionable under RICO. A party is liable under RICO only when it engages in a pattern of specified *criminal* activity, including mail fraud.[7] But where a pattern of indictable mail fraud is present, there is no justification for imposing an artificial limitation, supposedly drawn from the common law, that proximate cause may exist in fraud cases only where A lies to B, and B justifiably relies on the falsehood to its detriment. The common law long has found actionable — and to this day continues to recognize — many different kinds of frauds, including frauds that operate through third parties.

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[7] As defined by Congress, the mail fraud statute broadly prohibits "*any* scheme or artifice to defraud" that involves use of the mails. 18 U.S.C. § 1341 (emphasis added). This Court recognized long ago that the statute's reach is wide, including "everything designed to defraud by representation as to the past or present, or suggestions and promises as to the future," *Durland v. United States*, 161 U.S. 306, 313 (1896), and the Court rejected an argument that "the statute reaches only such cases as at common law would come within the definition of 'false pretenses,'" *id.* at 312. Accordingly, courts have found mail fraud in a wide range of factual settings, many of which did not involve false statements made directly to the person defrauded. *See, e.g., Carpenter v. United States*, 484 U.S. 19 (1987) (mail fraud found where defendant fraudulently traded on his employer's confidential business information); Michael Goldsmith & Evan S. Tilton, *Proximate Cause in Civil Racketeering Cases: The Misplaced Role of Victim Reliance*, 59 Wash. & Lee L. Rev. 83, 86-87 nn.12-20 (2002) (listing cases affirming mail fraud convictions for a wide range of schemes).

That the common law precludes the arbitrary and unyielding line that petitioners seek to draw is unsurprising. As this Court has emphasized, proximate cause took "many shapes" at common law, and it would be "virtually impossible to announce a black-letter rule" governing the proximate cause inquiry. *Holmes*, 503 U.S. at 268, 272 n.20 (quoting *Associated Gen. Contractors of Cal., Inc. v. California*, 459 U.S. 519, 536 (1983)). There is no basis in the common law for imposing a black-letter rule that proximate cause may exist in a fraud case only where the plaintiff received and personally relied on the defendant's falsehood.[8]

B. Reliance By The Plaintiff Is Not Required By The Directness Requirement Recognized In *Holmes* And *Anza*.

1. In addition to being consistent with the common law, respondents' assertion of proximate cause is consistent with this Court's more particular articulation of the directness requirement imposed by RICO.[9] In *Holmes* and in *Anza*, the Court

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[8] In an amicus brief on the merits filed by the United States in *Bank of China v. NBM L.L.C.*, 546 U.S. 1026 (2005) (No. 03-1559), the Solicitor General similarly argued that civil RICO cases based on mail or wire fraud do not require reliance by the plaintiff to establish the requisite causal link between the injury and the RICO violation. *See* Brief for the United States as *Amicus Curiae* at 21, *Bank of China v. NBM L.L.C.*, 546 U.S. 1026 (2005) (No. 03-1559), *available at* 2005 WL 2875061.

[9] Apart from the question of reliance, on which petitioners contended the Circuits were split, petitioners did not seek review of the Court of Appeals' proximate cause analysis,

explained the role of directness by emphasizing the three "underlying premises" of the directness requirement. First, an injury is more likely to be indirect "the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors." *Holmes*, 503 U.S. at 269; *Anza*, 547 U.S. at 458. Second, an injury is more likely to be indirect when allowing the claim "would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Holmes*, 503 U.S at 269; *see also Anza*, 547 U.S. at 459-60. And third, an injury is more likely to be indirect when "directly injured victims can generally be counted on to vindicate the laws as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes*, 503 U.S. at 269-70; *see also Anza*, 547 U.S. at 460.

In this case, as the Court of Appeals found, all of the considerations underlying *Holmes* and *Anza* reinforce the directness of respondents' injury. First, respondents' damages are attributable *entirely* to the conduct of petitioners. In *Anza*, the plaintiffs' claim for damages required the Court to trace an "uncertain" path from defendants' tax evasion to its decreased prices to plaintiffs' lost sales. 547 U.S. at 460. In contrast, the facts here do not require the Court to undertake uncertain calculations about the

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including its application of the *Holmes* and *Anza* factors. That analysis is thus not part of the question presented.

mechanics of a typical competitive marketplace or the relative effects of multiple actors in a distribution chain. "Businesses [may] lose and gain customers for many reasons," *id.* at 459, but the same cannot be said of tax buyers and liens. Tax buyers such as respondents who seek to obtain liens at 0% penalty lose tax liens not because of price, quality, or service competition, but simply because of the presence of other qualified tax buyers in the County's rotational apportionment system. The measure of damages suffered by respondents is thus straightforward: it is the value of the liens that would have been assigned to respondents if the Related Entities had been excluded from the tax sales, as they would have been but for their fraud. *See* Pet. App. 3a (damages are "the value of the liens that would have gone to Phoenix Bond and BCS Services had Sabre Group and its affiliates complied with the Single, Simultaneous Bidder Rule"). Calculating the damages attributable to the petitioners' scheme for packing the tax sale thus depends on no "other, independent factors" that might make respondents' injury indirect.[10]

Second, because there is no "appreciable risk of duplicative recoveries," *Anza*, 547 U.S. at 459, the courts below will not have to adopt complicated rules

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[10] As even petitioners' *amicus* concedes, "[t]he unique bidding system allegedly employed by the Treasurer's Office means that one can accurately predict how tax liens will be allocated among bidders based on an examination of all bids, with allocation allegedly based on the number of bidders submitting identical bids rather than on any subjective evaluation of bids." Washington Legal Foundation ("WLF") Br. 14 n.4.

apportioning damages "among plaintiffs removed at different levels of injury from the violative acts." *Holmes*, 503 U.S. at 269. There is no need here to apportion damages between respondents and the County, because regardless of who purchases a tax lien the County will be paid its taxes in full and will suffer no financial loss. Pet. App. 5a. Respondents' injury is not derivative of any economic loss of the County, passed downstream to the tax buyer. Nor must damages be apportioned between respondents and property owners, because property owners have obtained the lowest penalty — 0% — that the County allows. *Id.* The only issue here is how the tax liens will be allocated among identical bidders who have offered the County and property owners everything they legally could obtain. And whether petitioners cheat that allocation process by bribing County officials, falsely swearing their independence from other bidders, or other illegal means, they are causing injury only to the other bidders who would have been awarded those properties but for petitioners' illegal conduct. As respondents have claimed damages only for losses stemming from those liens that they "would have been able to acquire" absent petitioners' scheme, JA ¶¶ 111, 115, 120, petitioners' potential liability is finite and readily determinable. Unlike in *Holmes*, 503 U.S. at 273, there is no risk that petitioners could be subjected to multiple overlapping damages awards by upstream or downstream entities, because there are no such entities here.[11]

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[11] Petitioners' *amici* place heavy reliance on decisions of this

Third, respondents are the only "immediate victims," *Anza*, 547 U.S. at 460, of petitioners' wrongful conduct, and thus if respondents cannot sue for RICO damages, then no one can. As noted, "Cook County did not lose even a penny," and "property owners are indifferent to who acquires the tax lien" because the penalty on virtually all properties is 0%. Pet. App. 5a. Thus, there are no more directly injured victims who can be "counted on to vindicate the law as private attorneys general." *Holmes*, 503 U.S. at 258; *Anza*, 547 U.S. at 460.

Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199 (1990), but those cases are readily distinguishable. The question addressed by the Court in each case was whether a downstream purchaser could sue for damages potentially caused because its supplier paid higher prices as a result of anti-competitive conduct in violation of the antitrust laws. The existence of complex problems of apportionment of damages among upstream and downstream entities was central to the Court's decision in both cases. Even in *UtiliCorp*, where the supplier/utility had a potential regulatory right to pass on to consumers its increased supply costs, this Court recognized that the utility would suffer its own damages as a result of changes in demand brought about by higher prices, and that, even as a regulated entity, it was not clear whether or when the utility would be able to pass on all of its increased supply costs. *See UtiliCorp*, 497 U.S. at 209 ("The state regulation does not simplify the problem but instead imports an additional level of complexity."). These problems of apportionment simply are not present here, and they are not inherent in fraudulent schemes that *directly* target one's competitor, as the common law long has recognized in classic cases such as *Rice v. Manley*, *Benton v. Pratt*, and the other cases cited in Part II.A, *supra*.

Thus, just as the instant case fits squarely within common law precedents, it fits squarely within this Court's application of those common law principles in *Holmes* and *Anza*.[12] *See* Pet. App. 4a-7a.

2. Permitting suit here is also consistent with Justice Breyer's concurring view of RICO's proximate cause requirements as set forth in *Anza*. Under Justice Breyer's view, RICO does not permit an end run around the antitrust laws by allowing claims of injury by one competitor "where the legitimate pro-competitive activity of another competitor immediately causes that injury." 547 U.S. at 479 (Breyer, J., concurring in part and dissenting in part). Here, the injury is caused not by a legitimate competitive activity such as lowering prices or producing a better product or service, but by the

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[12] This Court's recent decision in *Stoneridge Investment. Partners, LLC, v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008), interpreting the private right of action implied in § 10(b) of the Securities Exchange Act of 1934, fits squarely within the proximate cause framework recognized in *Holmes* and *Anza*. *Cf.* Petr. Br. 34. In *Stoneridge*, plaintiffs sought to impose § 10(b) liability on respondents, who were business partners of Charter Communications, a company that had issued misleading financial statements. In rejecting liability, the Court noted that "[i]t was Charter, not respondents, that misled its auditor and filed financial statements," and "nothing respondents did made it necessary or inevitable for Charter to record the transactions as it did." 128 S. Ct. at 770. The claims at issue in *Stoneridge*, therefore, raised the precise concern this Court identified in *Holmes* and *Anza* about the difficulty in determining whether plaintiffs' damages were attributable to the defendants' conduct or, instead, to "other, independent factors." *Holmes*, 503 U.S. at 269. As noted, that concern is entirely absent here.

illegitimate activity of packing the tax sale with entities that claim to be independent but are in fact part of a coordinated scheme — an activity that hinders rather than advances competition.

Moreover, as Chief Judge Easterbrook recognized, the actions taken by petitioners did not make the lien apportionment process any more competitive or have any salutary effect on the price of liens. Virtually all liens were already being sold at the lowest possible price (*i.e.*, a 0% penalty). That is hardly surprising, because the County prohibits the sale of any lien for which there are multiple offers *above* a 0% penalty, and the County does not allow offers below 0%. More to the point, even if 0% were not otherwise the norm, the presence of a group of related tax buyers participating in a coordinated scheme is unlikely to drive down the penalty, since the entire point of the scheme is for those buyers to act in concert. The presence of the Related Entities thus has no positive effect on competition.

* * *

In sum, there is no basis in the common law or in *Holmes* or *Anza* to justify the bright-line requirement of first-party reliance that petitioners would impose on the RICO proximate cause analysis. The intended consequence of petitioners' fraudulent scheme was to secure profits by depriving respondents and other good-faith tax buyers of their fair share of liens. "The harm to [respondents] was [thus] clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy. Where the injury alleged is so integral

an aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations would be likely to cause." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982) (internal quotation marks omitted). Having purposely executed a successful scheme to obtain liens and the related profits at respondents' expense through fraud, petitioners should not be heard to complain that their conduct did not proximately cause respondent's injury.[13]

The Court of Appeals thus correctly applied *Holmes* and *Anza* when it concluded that respondents' claim of injury was sufficiently direct, discrete, and traceable to the petitioners' fraudulent conduct to satisfy proximate cause.[14]

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[13] *Amicus* Washington Legal Foundation concedes this point when it submits that victims of mail fraud who are "directly targeted" by defendants have demonstrated the existence of proximate cause. WLF Br. at 13 n.3.

[14] Although beyond the scope of the question presented, there is no basis here for concluding that respondents fall outside the zone of interests alluded to by Justice Scalia in *Holmes*. *Holmes*, 503 U.S. at 287 (Scalia, J., concurring). As Chief Judge Easterbrook recognized, Pet. App. 8a, the mail fraud statute was designed to protect those deprived of money or property as the direct victims of a scheme to defraud, and RICO was intended to provide a remedy for businesses that were the direct victims of such mail fraud schemes. Respondents' allegations place them squarely within the "class of persons" that Congress was trying to protect. *Holmes*, 503 U.S. at 287 (Scalia, J., concurring). Nor is there any serious contention that the type of injury suffered by respondents lies outside the relevant zone of interests. *Cf. id.* (discussing heart attack caused by one learning of fraud).

III. POLICY CONCERNS CANNOT JUSTIFY IMPOSING A FIRST-PARTY RELIANCE RESTRICTION HERE.

Unable to locate a first-party reliance restriction in the common law or in this Court's RICO decisions, petitioners and their *amici* raise a series of policy and practical concerns about the scope of RICO and the purported "over-federalization" of state law that they say support restricting RICO claims. But even if this Court rather than Congress were the right body to impose restrictions that have no basis in the language of the statute — and it is not — petitioners' practical concerns are overstated and their solutions are at odds with the congressional policies reflected in RICO. Indeed, petitioners' quarrel is at bottom with Congress' decision to include mail fraud and wire fraud as predicate acts, a policy judgment that was, and is, Congress's to make.

At the outset, the purported concern of petitioners and their *amici* about a flood of RICO claims is not credible. Despite their invocation of the "ever-increasing number of civil RICO suits filed each year," WLF Br. at 18, RICO claims have not increased in recent years, and they remain a tiny percentage of the federal civil docket.[15] Nor will affirmance here change that. It is already the law in

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[15] In 2001, there were 791 private civil RICO cases filed, and in 2007 there were 703 cases filed. In 2001, RICO cases accounted for 0.31% of the federal civil docket, while in 2007 RICO cases had *declined* to approximately 0.25% of the federal civil docket. *See* Federal Judicial Caseload Statistics 2001-2007, Table C-2, *available at* http://www.uscourts.gov/caseloadstatistics.html.

most Circuits that the direct victim of a mail fraud scheme may pursue relief even if the scheme directs the fraudulent statements to a third party.[16] And

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[16] The Circuit cases cited by petitioners, *see* Petr. Br. 29-34, involve frauds perpetrated on the *recipients* of the false statements at issue. More significant, virtually every Circuit to consider the issue has recognized that, in a case where the plaintiff is the "target" or "direct victim" of a fraud involving false statements to third parties, the plaintiff may state a claim for fraud-based civil RICO. *See, e.g., Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 564-65 (5th Cir. 2001) ("a target of a fraud that did not itself rely on the fraud may pursue a RICO claim if the other elements of proximate causation are present"); *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004) (RICO claim may be stated "even where the scheme depended on fraudulent communications directed to and relied on by a third party"), *rev'd on other grounds*, 547 U.S. 451 (2006); *Mid Atlantic Telecom, Inc. v. Long Distance Srvcs., Inc.*, 18 F.3d 260, 263 (4th Cir. 1994) (RICO claim could be stated if plaintiff showed it was a "direct target" of the fraud and defendant sought "to obtain an unfair competitive advantage in recruiting [plaintiff's] customers"); *cf. Brown v. Cassens Transp. Co.*, 492 F.3d 640, 644-46 (6th Cir. 2007). Other Circuits have adopted a broad view of reliance based on plaintiff's "reliance" on the "integrity" of official proceedings. *See Chisolm v. TranSouth Financial Corp.*, 95 F.3d 331, 339 (4th Cir. 1996) (remanding to allow RICO claim to proceed if plaintiffs pleaded they had acted in "reliance on the apparent legitimacy and legality of the operation"); *Living Designs, Inc. v. E.I. DuPont de Nemours and Co.*, 431 F.3d 353, 363 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 2861 (2006) (finding it sufficient that plaintiff had relied on defendant to "obey statutes, court orders, court rules ... and representations made under oath to the court by [defendant]") (quoting complaint) (internal quotation marks omitted). Petitioners are thus wrong to suggest that courts have upheld RICO actions based on fraud only when the plaintiffs were injured by false statements made directly to them.

there is no evidence that RICO claims are more abundant in the Circuits that have rejected petitioners' argument than in Circuits that have yet to do so, or that RICO claims based on mail fraud have become more prevalent.

That is not surprising. The scope of claims implicated by the rule the Seventh Circuit applied is narrow and of strong pedigree. Petitioners targeted their direct competitors for the liens by making false statements to the County, which itself suffered no financial injury, depriving respondents of liens that they otherwise would have received. This fact pattern — unlike those of *Holmes* and *Anza* — fits comfortably within a common law framework that courts have applied for hundreds of years.

Moreover, Congress and this Court have *already* ensured that truly indirect frauds are eliminated by the application of the rigorous proximate cause analysis set forth in *Holmes* and *Anza*. *See Brown v. Gardner*, 513 U.S. 115, 119 (1994) (observing that (proximate cause "narrow[s] the class of compensable cases" by "eliminating remote consequences"); *Holmes*, 503 U.S. at 268 (same). By focusing on the availability of other victims more directly affected by a particular fraud and by limiting recovery when there are upstream victims who have been damaged by the fraud, the *Holmes* and *Anza* factors help to identify the most appropriate plaintiff to hold defendants accountable for their fraud. In the usual case, as *Holmes* and *Anza* make clear, that plaintiff will be the party who relies directly on the fraud. Accordingly, the class of cases affected by affirming

Chief Judge Easterbrook's decision will be relatively modest.[17]

Nor is there any basis to petitioners' claim that affirmance here would, for example, transform every products liability case into a RICO case. Petr. Br. 14. At the outset, most products liability cases involve injuries to *persons* rather than injuries to "business or property" and thus are outside the scope of RICO in any event. Moreover, the directness requirement recognized in *Holmes* and *Anza* will generally limit the availability of RICO in such cases, as even the cases cited by petitioners confirm.[18] Nor would

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[17] Although the number of third-party reliance cases that will satisfy the *Holmes* and *Anza* factors may prove to be few, the instant case is by no means a "perfect storm" exception of unique, incomparable facts. In addition to fact patterns similar to that at issue here, it is not hard to imagine that a mob-controlled enterprise could send forged documents and fabricated witness statements through the mails to third parties to directly harm a competing business, causing injury of the precise kind Congress sought to address through RICO. If the other elements of RICO are present, the proper inquiry in such cases should be proximate cause and the directness requirement set forth in *Holmes* and *Anza*, not whether plaintiff could satisfy an arbitrary requirement of "first-party" reliance.

[18] For example, in *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000) — a case repeatedly cited by petitioners and their *amici*, *e.g.*, Petr. Br. 14, 18, 29, 39 — plaintiffs who owned buildings that contained defendants' plumbing products alleged that defendants had made fraudulent statements to contractors and others to encourage usage of the products. Judge Higginbotham's unanimous opinion for the court applied *Holmes* and rejected plaintiffs' RICO claim, concluding that the alleged injury was indirect because of the presence of upstream contractors better situated

affirming the Seventh Circuit give a class of such product liability plaintiffs any greater leverage, *cf.* McKesson Corp. ("McKesson") Br. 29-33, since each plaintiff would still have to demonstrate proximate causation.[19]

There is similarly no force to the argument that a first-party reliance requirement is appropriate where the third party who relies on the fraud is a government entity, which could in theory protect its own interests by prosecution or otherwise. At common law, the presence of the government as the third party mechanism for a defendant's fraud was no bar to recovery. *See, e.g., Restatement (Second) of Torts* § 623A, cmt. a (1977); *Buxton Manufacturing*, 239 A.D.2d at 453-54 (misrepresentations to U.S. Department of Agriculture); *cf. Suffolk County v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990) (holding that plaintiff could in theory state

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to bring claims. *Id.* at 560 ("any fraud during the sale of those products proximately injured only those initial purchasers who relied on the alleged misrepresentations"). The court made clear, however, that it was *not* applying any inflexible rule of first-party reliance, observing that, in addition to those who relied on the fraud, appropriate potential plaintiffs might include those who had "been the target of the fraud," as well as "defendants' competitors" seeking to "recover for injuries to competitive position." *Id.* at 561. Cases like *Summit* thus confirm respondents' position that the proximate cause analysis recognized in *Holmes* and *Anza*, and not some inflexible rule of first-party reliance, charts the proper course.

[19] Equally flawed is petitioners' argument that affirmance will permit a civil RICO claim every time a business competitor lies to the government. Indeed, *Anza* itself, which rejected such a claim, makes that clear.

a claim based on misrepresentations to the state Public Services Commission, although concluding that plaintiffs had failed to show the Commission actually relied on the misrepresentations) (cited with approval by this Court in *Holmes*, 503 U.S. at 272 n.19).

Petitioners' invocation of the potential for government enforcement is, moreover, especially misplaced here. The County suffered no financial injury and thus has little incentive to pursue potential wrongdoing. *See* Pet. App. 6a. Municipal governments have limited budgets, with myriad priorities competing for scarce resources. There is thus no justification for crafting special proximate cause restrictions on RICO's express private right of action simply because a government entity may prosecute or penalize wrongdoers.

Limiting recovery when the government has enforcement authority is also at odds with Congress' inclusion of a private right of action for RICO claims predicated on mail fraud. As Chief Judge Easterbrook noted, "if a government's ability to penalize fraud knocked out private litigation, then § 1964 would no longer apply when the predicate act is fraud, for governments always have some ability to detect and penalize fraud." Pet. App. 6a-7a. And it would be particularly unwarranted to rely on government prosecution in the context of RICO given Congress's conclusion that RICO was necessary to combat entities that were "subvert[ing] and corrupt[ing] our democratic processes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84

Stat. 922-23 (Statement of Findings and Purposes). RICO's private right of action was intended to "enhance the effectiveness of [RICO's] prohibitions," *Sedima*, 473 U.S. at 487-88, and given that respondents are the sole parties injured by petitioners' actions, their suit is an entirely appropriate use of the right of action.

Similarly at odds with RICO is petitioners' effort to limit the claims on the ground that petitioners and respondents are business competitors. Petr. Br. 38; WLF Br. 15-16. The harm that businesses suffered at the hands of their competitors' illegal actions was at the heart of Congress's concerns. *See, e.g.*, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (finding that organized crime's "illegal use of force, fraud and corruption . . . weaken[s] the stability of the Nation's economic system, and harm[s] . . . competing organizations" (Statement of Findings and Purposes). And as this Court has previously observed, Congress evinced concern for the competitive harm caused by even "legitimate" businesses engaged in unlawful activity because "[l]egitimate businesses 'enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences.'" *H.J., Inc.*, 492 U.S. at 249 (quoting *Sedima*, 473 U.S. at 499). The very fact that Congress drafted RICO to provide recovery for "injury to *business* or property" indicates that the claim of injury alleged here is within RICO's intended ambit.[20]

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[20] McKesson alternatively urges the Court to adopt what McKesson calls the "immediate victim" approach rather than

In any event, all of petitioners' arguments for drawing arbitrary and unyielding lines to limit RICO claims proceed from an improper premise: that Congress's express enactments may be contravened for the sake of policy considerations. The best indication of the "appropriate scope" of RICO is the statute's text and structure, which plainly do not incorporate a reliance element for civil RICO actions. What petitioners and *amici* style as the "over-federalization" of RICO claims amounts to a raw petition to this Court to trump Congress's chosen policies with their own.

This Court has repeatedly heard and rejected similar policy pleas. *See supra* 23-24 (collecting cases); *see also H.J. Inc.*, 492 U.S. at 249 ("[R]ewriting [RICO] is a job for Congress, if it is so inclined, and not for this Court."); *Schreiber Distrib. Co. v. Serv-well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) ("[W]e are required to follow where the words of [RICO] lead.") (Kennedy, J., concurring). As Chief Justice Rehnquist put it, "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *NOW*, 510 U.S. at 262 (refusing to read an "economic motive" requirement into RICO) (quoting *Sedima*, 473 U.S. at 499).[21]

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the "principal losers" approach. McKesson Br. 34-35. As McKesson's brief makes clear, respondents would prevail under McKesson's alternative approach.

[21] Petitioners and *amici* repeatedly cite a 1989 lecture given by Chief Justice Rehnquist in which he questioned Congress's

Indeed, the force of the argument that Congress rather than the Court should set policy here is at its zenith because Congress has not hesitated to amend RICO when it believed that policy concerns so demanded. Thus, for example, in response to concerns raised by securities defendants regarding the scope of RICO in cases of securities fraud, Congress in 1995 removed securities fraud from the purview of RICO's private right of action altogether. *See* 18 U.S.C. § 1964(c) (providing that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962"). More broadly, Congress has not hesitated over the years to alter RICO's predicate acts when it concluded that policy considerations required. *See generally Anza*, 547 U.S. at 472-74 (Thomas, J., concurring in part and dissenting in part) (noting legislative proposals and amendments to RICO).

In sum, there is little doubt that the various rules advanced by petitioners and their *amici* would limit to some degree the number of RICO cases that could be brought with mail fraud or wire fraud as predicate acts. But a mere reduction in the number of RICO cases, untied to text, common law, or this Court's precedent, has little to recommend it. If anyone is to decide that victims are bringing too many RICO

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wisdom in drafting RICO so broadly. *E.g.* Petr. Br. 37, 38. None of them, however, cites Chief Justice Rehnquist's subsequent opinion for the Court in *NOW*, quoted above, in which he held that Congress's decision to draft a broad statute must be respected.

cases based on mail fraud and wire fraud, it is Congress, not this Court, that must do so. And that is particularly so when, as here, the arbitrary restriction that petitioners request will result in the elimination of claims that were at the core of cases that motivated Congress to act in the first place — cases of honest businessmen directly harmed in their business by competitors who violate the law.

CONCLUSION

The decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

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REPLY BRIEF

(15)

No. 07-210 4-7-08

In the Supreme Court of the United States

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Petitioners,

v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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In the Supreme Court of the United States

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JOHN BRIDGE, *et al.*,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

Respondents make three principal errors. First, they deny the significance of the common law in answering the question presented, even though (a) this Court has endorsed the common-law meaning rule, (b) the Court has applied the rule in both civil RICO cases and federal mail fraud cases, and (c) it is undisputed that neither the RICO statute nor the mail fraud statute defines "fraud" or "scheme to defraud." Second, having wrongly denied the relevance of the common law, respondents compound the problem by misstating what the common law of fraud is. Relying either on isolated cases that do not represent the governing law in their jurisdictions, or on cases that do not involve fraud at all (but rather other torts), respondents attempt to deny the overwhelming consensus of common-law jurisdictions that reliance by the plaintiff on an alleged mis-

representation is an element of a fraud claim. Third, in responding to petitioners' alternative argument based on the numerous cases that treat reliance as an aspect of proximate cause for fraud claims, respondents contend that the metes and bounds of proximate cause are, in all circumstances, fully encompassed within the three-part directness inquiry that this Court found dispositive in *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451 (2006). Respondents thus wrongly seek to deny that the common-law concept of proximate cause can include a requirement of reliance by the plaintiff in cases alleging fraud.

Whether viewed as an element of a civil fraud claim or as a component of proximate cause in such cases, a plaintiff's reliance is a threshold requirement that a plaintiff must plead to state a valid civil RICO claim predicated on fraud. Respondents have not pled—and do not even try to argue that they could plead—that they relied on any alleged misrepresentation by petitioners. (This is hardly surprising, since respondents do not allege that they ever even received any such misrepresentation, by mail or otherwise.) Because respondents cannot allege any such reliance, the court of appeals should have affirmed the dismissal of their civil RICO claims based on fraud.

Requiring plaintiffs asserting RICO claims based on fraud to plead that they themselves relied on the defendant's alleged misrepresentations has the salutary effect of enabling federal courts to weed out, at an early stage, claims not properly filed under RICO. Given the special burdens imposed by civil RICO litigation, including not only burdens of cost and duration, but also the public opprobrium and damage to reputation visited on defendants who have

been labeled racketeers, an early screening device such as the reliance requirement permits federal courts to prevent garden-variety disputes between local competitors (such as this case) from being converted into federal racketeering actions.[1]

Although respondents and their *amici* revel in accusing petitioners of seeking to add to civil RICO fraud claims a requirement that is not present in the statute, in reality it is respondents and their supporters who are seeking to expand civil RICO claims to include numerous varieties of potentially tortious conduct that may be actionable but that are not addressed by the RICO statute and do not qualify as fraud against the plaintiff. Respondents already have asserted a state law claim for tortious interference with prospective economic advantage. If they are entitled to any relief at all, they can find it there, without twisting the RICO statute to reach any tort in which any defendant has made an allegedly false statement to anyone.

ARGUMENT

1. Reliance By *Someone* Is Required For A Civil RICO Claim Predicated On Mail Fraud, Even Though The Word "Reliance" Does Not Appear In RICO Or The Mail Fraud Statute.

It now appears to be common ground that reliance by *someone* is essential for a civil RICO claim based on fraud. Respondents concede that a civil RICO

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[1] *See, e.g., Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990) ("The mere assertion of a RICO claim . . . has an almost inevitable stigmatizing effect on those named as defendants." Courts therefore "should strive to flush out" unwarranted RICO allegations "at an early stage of the litigation.").

claim predicated on mail fraud "generally will require proof that someone relied on the falsehoods." Resp. Br. 13; *see also id.* at 2, 17, 22, 24. Respondents repeatedly use the qualifier "generally," but they never explain why, and they never attempt to posit any situation in which a civil RICO action alleging fraud could be sustained without any reliance by anyone. The federal government is more direct: "In a civil RICO claim predicated on mail fraud, the plaintiff cannot logically establish causation without showing that *someone* relied on the misrepresentation in furtherance of the fraud." Gov. Br. 6-7 (emphasis in original).[2] The answer to the first part of the question on which the Court granted review, in other words, is an unqualified "yes," and that is so even though neither RICO nor the mail fraud statute uses the word "reliance."

The consensus that at least *some* reliance is required to bring a civil RICO claim based on fraud reflects the distinction between civil RICO claims predicated on fraud and criminal prosecutions based on similar underlying conduct. Respondents are simply wrong when they assert that as long as conduct is "indictable" as mail fraud, nothing more is required. To sustain a *criminal* conviction under the federal mail fraud statute, neither reliance nor damages are needed. *See, e.g., Neder v. United States*, 527 U.S. 1, 25 (1999). By contrast, in a civil RICO claim, the focus is not on the mail fraud statute alone (which provides no private right of action), but

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[2] *See also* Brief of the States of Connecticut, *et. al.* as *Amici Curiae* In Support Of Respondents at 5 (arguing only against requirement of "reliance by the plaintiff"); Brief of *Amicus Curiae*, International Association Of Insurance Receivers In Support Of Respondents ("Insurance Receivers Br.") at 3 (same).

on the interplay between RICO's civil damages provision and the predicate acts of racketeering activity alleged. Where those predicate acts involve fraud, the question is not *whether* reliance is needed but only *whose* reliance is required. For the answer to that question, the appropriate place to turn is the common law.

2. The Common-Law Meaning Rule Should Be Applied To Determine Whether Reliance By The Plaintiff Is Required For A Civil RICO Claim Predicated On Mail Fraud.

Because neither the text of RICO nor the text of the mail fraud statute, 18 U.S.C. § 1341, defines "fraud" or "scheme to defraud" or expressly addresses reliance, "there is a necessary second step." *Neder*, 527 U.S. at 21. As this Court has explained, "[i]t is a well-established rule of construction that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, *a court must infer, unless the statute otherwise dictates*, that Congress means to incorporate the established meaning of these terms.'" *Id.* (emphasis added). Petitioners thus are not asking this Court to rewrite RICO, as respondents contend. Resp. Br. 23. Rather, petitioners ask only that the Court apply the same "well-established rule of construction" that the Court already has held should be applied when Congress uses terms with settled common-law meaning.

In *Neder*, this Court was asked to decide whether materiality is an element of a "scheme or artifice to defraud" under the federal mail fraud, wire fraud, and bank fraud statutes. Because the text of these three statutes does not define the phrase "scheme or artifice to defraud," the Court applied the common-

law meaning rule. Specifically, in defining the term "defraud," this Court referred to the "well-settled meaning" at common law of the term "fraud." 527 U.S. at 22. Concluding that "the common law could not have conceived of 'fraud' without proof of materiality[,]" *id.* at 22, the Court held that materiality of a falsehood is an element of all three of the federal fraud statutes. *Id.* at 25; *see also Wilkie v. Robbins*, 551 U.S. ___, 127 S. Ct. 2588, 2605-07 (2007) (applying common-law meaning rule and referring to common law of extortion while construing the Hobbs Act, 18 U.S.C. § 1951, to define predicate act under RICO); *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 400 (2003) (same).

This Court also confirmed in *Neder* that "[t]he common-law requirements of 'justifiable reliance' and 'damages'" are not prerequisites for conviction under the federal criminal fraud statutes. 527 U.S. at 24-25. But this aspect of the Court's decision did not depend on interpretation of the statutory term "defraud." Rather, it was based on the fact that, as *criminal* provisions, the federal fraud statutes do not require a "completed fraud." *Id.* at 25. For this reason, the criminal statutes can be violated, and a criminal conviction can be sustained, even if no one has relied on a misrepresentation and even if no one has been injured as a result.[1]

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[1] In *United States v. Stewart*, 872 F. 2d 957 (10th Cir. 1989), which this Court relied upon in *Neder*, 527 U.S. at 25, the court explained why the mail fraud statute requires neither reliance nor damages:

> It is well established, however, that an offense under § 1341, unlike common law fraud, does not require the successful completion of the scheme to defraud. *It follows from this* that the government does not have to prove

Subsequently, in *Beck v. Prupis*, 529 U.S. 494 (2000), this Court considered whether a plaintiff who brings a civil action predicated on a violation of § 1962(d), which prohibits conspiracies to violate RICO, must allege that he was injured by an overt act that is itself either a racketeering act or otherwise unlawful. Even though this Court previously had defined what constitutes a violation of § 1962(d) based on the common law of criminal conspiracy, *see Salinas v. United States*, 522 U.S. 52, 63-65 (1997), it did not apply that definition in *Beck*. Rather, because *Beck* "d[id] not present simply the question of what constitutes a violation of § 1962(d), but rather the meaning of a civil cause of action for private injury by reason of such a violation[,]" this Court determined that the definition of the term "conspiracy" based on criminal law was not the appropriate reference. *Beck*, 529 U.S. at 501 n.6. As this Court explained:

> This case turns on the combined effect of two provisions of RICO that, read in conjunction, provide a civil cause of action for conspiracy. Section 1964(c) states that a cause of action is available to anyone "injured . . . by reason of a violation of section 1962." Section 1962(d) makes it unlawful for a person "to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section." To determine what it means to be "injured . . . by reason of" a "conspir[acy]," we

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actual reliance upon the defendant's misrepresentations nor do they have to prove that the victim suffered actual pecuniary losses from the scheme.

Stewart, 872 F. 2d at 960 (emphasis added) (internal citations omitted).

> turn to the well-established common law of civil conspiracy.

Id. at 500.

The ruling in *Beck* that the term "conspiracy" in § 1962(d) has different meanings in the criminal context and the civil context is consistent with this Court's standard approach to statutory interpretation. For example, just last term in *Safeco Insurance Co. v. Burr*, 551 U.S. ___, 127 S. Ct. 2201 (2007), this Court was asked to define the term "willfulness" in the civil liability provision of the Fair Credit Reporting Act. Before applying the common-law meaning rule, this Court first observed that "willfulness" has different meanings in civil common law and criminal common law. The Court concluded that the civil meaning should be applied when construing a civil liability statute. *Id.* at 2208-09 and n.9. *See also Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994) (contrasting the different uses of the term "recklessness" in civil and criminal contexts).

Here, as in *Beck*, plaintiffs assert a civil cause of action for private injury by reason of a violation of RICO. And, as in *Beck*, the Court's task is to interpret RICO's civil action provision (§ 1964(c)) in conjunction with a criminal statute on which the claim is predicated (the mail fraud statute). Consequently, as in *Beck*, this Court should apply the common-law meaning rule and refer to the appropriate civil common law. In this instance, "[t]he obvious source in the common law for the combined meaning of these provisions is the law of civil [fraud]." *Beck*, 529 U.S. at 501 n.6.

Respondents attempt to distinguish *Beck* and thereby avoid application of the common-law

meaning rule by arguing that RICO does not define the term "conspiracy," but that it does define its predicate acts. Resp. Br. 23. This just begs the question of how the predicate acts themselves are defined, and when it turns out, as it does here, that the predicate act "definitions" themselves use undefined terms with well-established meanings at common law, the Court is led right back to the common-law meaning rule. And, since the purpose here is, as it was in *Beck*, to determine the proper scope of *civil* liability, it is appropriate to look to the common law of civil fraud to determine the prerequisites for a civil action like that filed by respondents.

Under § 1964(c), a plaintiff must plead and prove that he was "injured" "by reason of a violation" of RICO. Obviously, a person cannot be injured by reason of a fraud that is not completed. *See Stewart*, 872 F.2d at 960 (common-law fraud requires successful completion of scheme to defraud). Therefore, unlike a criminal prosecution under the mail fraud statute, a civil action under RICO predicated on mail fraud requires a completed fraud. It follows from this that, to determine the meaning of a civil action under § 1964(c) predicated on mail fraud, the Court should look to the common-law meaning of "fraud" to identify the elements of a completed fraud.

Finally with respect to the applicability of the common-law meaning rule, one of respondents' *amici* argues that the rule should not be applied here because the RICO statute "otherwise dictates." Insurance Receivers Br. 3. But nothing in RICO directs this Court to jettison the common-law meaning rule when interpreting statutory terms that have an established common-law meaning. If it did,

the Court would not have looked to the common law in cases like *Beck* and *Scheidler*. Nor have respondents or their *amici* identified any other reason to depart from this Court's precedent requiring application of the common-law meaning rule. Consequently, "a court must infer . . . that Congress mean[t] to incorporate the established meaning of these terms." *Neder*, 527 U.S. at 21.

3. Respondents' Reference To Irrelevant Provisions Of The Restatement And Isolated Judicial Decisions Cannot Overcome The Dominant Consensus Of Common-Law Jurisdictions That Reliance By The Plaintiff Is A Required Element Of A Fraud Claim.

Respondents and their *amici* do not dispute that, when this Court looks to the common law to interpret statutes, it looks to "the general common law of torts, [*i.e.*,] the dominant consensus of common-law jurisdictions, rather than the law of any particular State." Pet. Br. 22 (quoting *Field v. Mans*, 516 U.S. 59, 71 n.9 (1995)). Nor do they dispute that this Court has stated that "the most widely accepted distillation of the common law of torts" is the *Restatement (Second) of Torts*. *Id.* (quoting *Field*, 516 U.S. at 70). Nevertheless, respondents and their *amici* rely primarily on a few isolated cases decided under New York law to support their contention that reliance by the plaintiff is not a required element of common-law fraud. They also rely on sections of the *Restatement (Second) of Torts* that pertain not to fraud, but to torts other than fraud. These isolated and irrelevant authorities are insufficient to refute petitioners' showing that "the dominant consensus of common-law jurisdictions" is that reliance by the plaintiff is a required element of common-law fraud.

Despite this Court's admonition in *Field v. Mans* that it does not look to "the law of any particular State," 516 U.S. at 71 n.9, respondents primarily rely upon *Rice v. Manley*, 66 N.Y. 82 (1876), and other New York case law to support their contention that reliance by the plaintiff is not a required element of common-law fraud. Resp. Br. 26-27; *see also* Gov. Br. 21-22. It is far from clear, however, that *Rice* even involves common-law fraud. And there is considerable doubt as to whether the New York cases cited by respondents accurately reflect even the current state of New York law, let alone the dominant consensus of common-law jurisdictions.

First, the New York Court of Appeals has characterized *Rice* not as a fraud case, but as a wrongful interference with contract case. *See Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, 451 (N.Y. 1980) (citing *Rice* in support of the proposition that "[w]here contracts terminable at will have been involved, we have upheld interference . . . when the alleged means employed by the one interfering were wrongful"); *Lamb v. S. Cheney & Son*, 125 N.E. 817, 818 (N.Y. 1920) (citing *Rice* as one of a number of cases establishing the rule that "if one maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can maintain an action against the wrongdoer."). And so too has this Court. *See Angle v. Chicago, St. Paul, Minneapolis and Omaha Ry. Co.*, 151 U.S. 1, 13 (1894) (citing *Rice* as one of many cases supporting the proposition that "[i]t has repeatedly been held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the

party injured can maintain an action against the wrongdoer.").

Second, if and to the extent that *Rice* arguably could be read to allow fraud claims absent reliance by the plaintiff, it is far from clear that the case accurately reflects New York law at the time RICO was adopted. As the Southern District of New York observed in a recent case cited by respondents, there are two distinct lines of authority that have addressed this issue under New York law: an older line of cases that holds that reliance by a third party is sufficient to sustain a cause of action for common-law fraud and a newer line of cases that holds that a claim for common-law fraud may not be based on third-party reliance. *N.B. Garments (PVT) Ltd. v. Kids Int'l Corp.*, No. 03 Civ. 8041, 2004 WL 444555 at *3 (S.D.N.Y. March 10, 2004) (following older line of cases). *Compare Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo*, 148 F.3d 194, 196 (2d Cir. 1998) ("we hold that a plaintiff does not establish the reliance element of fraud for purposes of . . . New York Law by showing only that a third party relied on a defendant's false statements."); *Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 534 (S.D.N.Y. 2007) ("New York law requires that the plaintiffs themselves be misled by the alleged misrepresentation or omission."). Thus, it is at best unclear whether even New York law would allow a fraud claim based on third-party reliance.

Respondents also cite *Gregory v. Brooks*, 35 Conn. 437 (1868). Resp. Br. 27. As the court's opinion makes plain, however, *Gregory* also was not a fraud case; rather, it was a case involving acts "done to one sustaining a *business relation* with the plaintiff, with a view of disturbing and breaking up that business

relation . . . ." *Id.* at 447 (emphasis in original); *see also Blake v. Levy*, 464 A.2d 52, 54 (Conn. 1983) (describing *Gregory* as a "case involving intentional interference with business relations."). In any event, at the time RICO was passed in 1970, reliance by the plaintiff unquestionably was a required element of a fraud claim under Connecticut law. *See Paiva v. Vanech Heights Constr. Co.*, 271 A.2d 69, 71 (Conn. 1970) ("The essential elements of an action in fraud are . . . that [the false representation] was made to induce the other party to act on it; and that he did so act to his injury"). Respondents also cite cases from Massachusetts and New Jersey that were decided more than a hundred years ago. Resp. Br. 28 n.5. But again, at the time RICO was passed in 1970, reliance by the plaintiff was a required element of a fraud claim in each of these jurisdictions. *See Barrett Assocs., Inc. v. Aronson*, 190 N.E.2d 867, 868 (Mass. 1963) (fraud claim requires that "the plaintiff relied upon the representation as true and acted upon it to his damage"); *Plimpton v. Friedberg*, 166 A. 295, 296 (N.J. 1933) (fraud claim requires "that the plaintiff, believing such representation to be true, acted upon it and was thereby injured.").

Conspicuously absent from respondents' and their *amici's* briefs is any reference to the law of the remaining forty-six states. Petitioners have researched the law of these jurisdictions, and the overwhelming majority of them explicitly require a fraud plaintiff to plead and prove his or her own reliance on the defendant's misrepresentation.[4]

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[4] *See Patten v. Alfa Mut. Ins. Co.*, 670 So. 2d 854, 856 (Ala. 1995); *Lightle v. State Real Estate Comm'n*, 146 P.3d 980, 983 (Alaska 2006); *Wal-Mart Stores, Inc. v. Coughlin*, --- S.W.3d ---, 2007 WL 1098162 at *6 (Ark. 2007); *Manderville v. PCG & S*

Thus, contrary to respondents' assertion (Resp. Br. 30), the "abundant case law" demonstrates that, at the time RICO was enacted, the dominant consensus of common-law jurisdictions required reliance by the plaintiff as an element of a fraud claim.

Turning to the Restatement, respondents do not dispute that the sections that address common-law fraud all require reliance by the plaintiff. Instead, employing a linguistic sleight of hand, respondents

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Group, Inc., 146 Cal. App. 4th 1486, 1498 (Cal. Ct. App. 2007); *Zimmerman v. Loose*, 425 P.2d 803, 807 (Colo. 1967); *Stephenson v. Capano Dev. Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *Madness, L.P. v. DiTocco Konstruction, Inc.*, 873 So. 2d 427, 429 (Fla. Dist. Ct. App. 2004); *Tankersley v. Barker*, 651 S.E.2d 435, 437 (Ga. Ct. App. 2007); *Hawaii's Thousand Friends v. Anderson*, 768 P.2d 1293, 1301 (Haw. 1989); *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 400 (Iowa 2001); *Kentucky Elec. Dev. Co.'s Receiver v. Head*, 68 S.W.2d 1, 3 (Ky. Ct. App. 1934); *Dowling v. Bangor Hous. Auth.*, 910 A.2d 376, 382 (Me. 2006); *James v. Weisheit*, 367 A.2d 482, 484 (Md. 1977); *Michael v. Jones*, 53 N.W.2d 342, 343 (Mich. 1952); *Swanson v. Domning*, 86 N.W.2d 716, 720 (Minn. 1957); *Nash v. Normandy State Bank*, 201 S.W.2d 299, 303 (Mo. 1947); *Ed Miller & Sons, Inc. v. Earl*, 502 N.W.2d 444, 452-53 (Neb. 1993); *Lubbe v. Barba*, 540 P.2d 115, 117 (Nev. 1975); *Keith v. Wilder*, 86 S.E.2d 444, 446 (N.C. 1955); *Leach v. Kelsch*, 106 N.W.2d 358, 364 (N.D. 1960); *Gold Kist Peanut Growers Ass'n. v. Waldman*, 377 P.2d 807, 813 (Okla. 1962); *Meader v. Francis Ford, Inc.*, 595 P.2d 480, 482 (Or. 1979); *Francis v. Am. Bankers Life Assurance Co. of Florida*, 861 A.2d 1040, 1046 (R.I. 2004); *Gomillion v. Forsythe*, 62 S.E.2d 297, 302 (S.C. 1950); *Speaker v. Cates Co.*, 879 S.W.2d 811, 816 (Tenn. 1994); *Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001); *Schwartz v. Tanner*, 576 P.2d 873, 875 (Utah 1978); *Dobbin v. Pacific Coast Coal Co.*, 170 P.2d 642, 648 (Wash. 1946); *Bicknese v. Sutula*, 660 N.W.2d 289, 294 (Wis. 2003); *Mueller v. Zimmer*, 124 P.3d 340, 349 (Wyo. 2005); *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 425 S.E.2d 144, 148 (W. Va. 1992).

assert that "frauds can occur in many ways, some of which involve falsehoods directed at third parties," and that "[s]ome of these frauds, in the classification of the Restatement, have acquired specialized labels as the law of torts has developed . . . ." Resp. Br. 30. Respondents then refer to "injurious falsehood" (citing *Restatement (Second) of Torts* § 623A (1977)) and to what they describe as "a tort where one 'intentionally and improperly interferes with another's prospective contractual relation'" (citing *Restatement (Second) of Torts* § 766B (1979)). *Id.* at 31; *see also* Gov. Br. 21 (asserting, without support, that mail fraud includes "not only common law fraud but also related torts . . . such as tortious interference"). But these so-called "related torts" are not common-law fraud. Rather, as the Restatement sections cited by respondents and their *amici* establish, they are separate and distinct torts with their own required elements. Moreover, this Court already has rejected respondents' argument that torts other than common-law fraud are encompassed by the mail fraud statute. *See Neder*, 527 U.S. at 24.

In *Neder*, the government argued, as respondents do here, that the mail fraud statute "sweep[s] more broadly than common-law fraud[,]" and that it is not limited "to conduct that would constitute 'fraud' at common law. . . ." *Id.* The government relied on *Durland v. United States*, 161 U.S. 306 (1896), where this Court had held that the mail fraud statute was not limited in scope to the common law definition of "false pretenses," which required a showing of a misrepresentation as to some *existing* fact and not a mere promise as to the future. *Neder*, 527 U.S. at 24. But while acknowledging that the mail fraud statute encompasses misrepresentations regarding the past, the present, *and* the future, and thus reaches conduct

that would not have constituted "false pretenses" at common law, this Court in *Neder* squarely rejected the government's argument "that the statute encompasses more than common-law fraud." *Id.* Nonetheless, the government and respondents repeat that rejected argument here. It should be rejected again.

Petitioners ask this Court to do no more than apply the common-law meaning rule and refer to the dominant consensus of common-law jurisdictions on the elements of fraud to resolve the statutory construction issue presented for review. Respondents, on the other hand, invite this Court to base its decision not on the common-law elements of fraud, but on the elements of other torts, such as injurious falsehood and interference with contractual relations. Respondents would, in effect, have this Court transform the "mail fraud" statute into a "mail tort" statute. It is respondents, therefore—not petitioners—who are asking this Court to rewrite a statute.[8]

4. Respondents And Their Amici Concede That Common-Law Proximate Cause Principles Incorporated By RICO Require Reliance By Someone, And They Ignore Restatement Sections And Case Law Cited By Petitioners Showing That Common-Law Causation Principles Require Reliance By The Plaintiff For Fraud Claims.

Respondents and their *amici* do not dispute that § 1964(c)'s "by reason of" language incorporates

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[8] As mentioned previously, respondents already have asserted a claim for tortious interference in this very case. It therefore would be not only improper but also entirely unnecessary to expand the scope of civil RICO to cover tortious conduct other than fraud.

common-law principles of proximate causation. Indeed, the government acknowledges in its brief that "the Court looks to the common law to inform its interpretation of [§ 1964(c)] and has adopted common law principles of proximate causation in that endeavor." Gov. Br. 20 (citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992)). Respondents and their *amici* also concede that § 1964(c) therefore requires that someone must rely on the defendant's misrepresentation when a civil RICO claim is predicated on mail fraud. Resp. Br. 24 ("it generally will be impossible to establish even but-for causation without reliance by someone"); Gov. Br. 10 ("when the underlying RICO violation consists of acts of mail fraud, general causation principles logically require that *someone* . . . have relied on the misrepresentations.") (emphasis in original). The only issue is who must rely.

In opposing petitioners' position that common-law principles of proximate causation require reliance by the plaintiff for a fraud claim, respondents assert that "there is nothing in the Restatement that suggests that frauds can be perpetrated *only* against the recipient of a misstatement." Resp. Br. 30 (emphasis in original). But in support of this assertion, respondents rely on sections of the Restatement that address torts other than fraud while ignoring sections that address fraud. *Id.* at 30-31 (discussing Restatement sections addressing injurious falsehood and intentional interference with contract relations). Among the Restatement sections not addressed by respondents or their *amici* is § 548A, entitled "Legal Causation of Pecuniary Loss," which is discussed in petitioners' opening brief. Pet. Br. 28. Particularly instructive is Comment *a* to this section, which states, in pertinent part, that: "Causation, in rela-

tion to losses incurred by reason of a misrepresentation, is a matter of the recipient's reliance in fact upon the misrepresentation in taking some action or in refraining from it." Respondents simply ignore this statement and others like it.[6]

Respondents and their *amici* also rely on the isolated and inconclusive New York case law discussed above to support their contention that common-law causation principles do not require reliance by the plaintiff for a fraud claim. Resp. Br. 26-29; Gov. Br. 21-22. At the same time, they completely ignore the case law from the Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits discussed in petitioners' opening brief that holds that common-law proximate cause principles incorporated through § 1964(c)'s "by reason of" language require reliance by the plaintiff for a civil RICO claim predicated on mail fraud. Pet. Br. 29-35. This prevailing case law is consistent with the Restatement sections cited by petitioners.

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[6] While ignoring § 548A of the Restatement, respondents take petitioners to task for purportedly omitting what they describe as "the critical portion of" § 537. Resp. Br. 30. Respondents assert that the omitted language shows that the requirement of reliance by the plaintiff applies only when the plaintiff is the recipient of the misrepresentation. *Id.* But respondents neglect to address the additional authority cited by petitioners immediately after the quotation from § 537. That authority shows that the reliance-by-the-plaintiff requirement is generally applicable to *all* fraud claims. Pet. Br. 22-23 (citing W. Keeton, et al., *Prosser and Keeton on Law of Torts* §108 (5th ed. 1984) and *Capiccioni v. Brennan Naperville, Inc.*, 791 N.E.2d 553, 558 (Ill. App. Ct. 2003) ("The elements of common-law fraud [include] . . . plaintiff's reliance upon the truth of the statement.")).

The federal government argues that it is "implausible that Congress intended to incorporate common law requirements (such as reliance by the plaintiff), tailored to each individual tortious act, as part of the statute's general proximate cause standard." Gov. Br. 21. But this argument is doubly flawed. First, it overlooks that respondents and their *amici* have conceded that reliance by someone must be shown to satisfy *Holmes'* proximate cause requirement when a civil RICO claim is predicated on mail fraud, and that even a third-party reliance requirement would apply only to claims predicated on the federal fraud statutes. And second, as the government acknowledges in its brief, the proximate-cause test under § 1964(c) necessarily will vary depending on which of the more than a hundred RICO predicate acts forms the basis for a civil RICO claim. Gov. Br. 13 (citing *Holmes*, 503 U.S. at 288 (Scalia, J., concurring)).

5. Respondents Improperly Act As If They Already Have Prevailed At Trial, And Much Of Their Argument Ranges Considerably Beyond The Allegations In The Complaint.

Having argued wrongly that the proximate cause element of a civil RICO claim consists entirely of the three-part directness inquiry described in *Holmes* and *Anza*, respondents and their *amici* then devote substantial energy to arguing that the "directness" requirement is satisfied here, even as they contend at the same time that the issue is not properly before the Court. Resp. Br. 33-39; Gov. Br. 24-27. The problems with respondents' argument are symptomatic of several significant flaws in respondents' case, which we address briefly here lest it be said that petitioners have conceded the points.

The district court decided this case on a motion to dismiss. Consequently, only the facts alleged in the complaint were properly before the court of appeals and are now before this Court. None of those facts have been proven. As to the alleged connection between petitioners' alleged misrepresentations and respondents' alleged injury, the complaint contains only a single relevant allegation. It states that, when more than one potential Tax Buyer bids a 0% penalty rate, "the auctioneer will allocate the liens *on a rotational basis* . . . ." JA 18 (emphasis added). The complaint does not describe what this alleged "rotational basis" is or how it allegedly operates. The court of appeals, however, perhaps in an excess of self-confidence, injected into the case an element of mathematical certainty that is missing from the complaint itself.

> The County's solution to the problem of multiple bids at 0% is allocation by lot. If X bids 0% on ten parcels, and each parcel attracts five bids at that penalty rate, then the County awards X two of the ten parcels. Winners share according to the ratio of their bids to the identical bids.

Pet. App. 2a. The complaint makes no mention of "allocation by lot." In suggesting that one can predict with mathematical precision how many and which liens would have been awarded to any given bidder if the SSB Rule had been followed, the court of appeals' opinion and respondents' brief in this Court elaborate significantly and inappropriately on the allegations in the complaint.

Moreover, the simple illustration offered by the court of appeals disregards the enormous complexity and indeterminateness that inevitably would be involved in attempting to reconstruct the auction

bidding process after the fact, based on changed assumptions regarding who should have been permitted to bid. Respondents themselves have alleged that at least 195 potential Tax Buyers registered to participate in the 2005 annual tax sale. JA 20-21. The number of registered bidders actually bidding on each lien fluctuates greatly throughout the auction. Different sets of bidders compete for different liens, and different combinations of bidders may tie at a 0% penalty rate for different liens. Respondents' blithe assertions about the alleged "directness" of their injury and the ease of determining damages (*see, e.g.*, Resp. Br. 35) are seriously misguided. In fact, the process would be incredibly difficult, if not impossible.[7]

Also problematic is how to determine the value of any lien that allegedly should have been awarded to respondents. For some time, the typical penalty rate bid on many liens has been 0%. JA 18. As a consequence, a lien can generate a profit for a Tax Buyer only when subsequent taxes are paid and the

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[7] Perhaps not surprisingly, respondents' complaint is devoid of any allegations about how the County Treasurer's auctions actually work. The auctions are conducted live and in person, using an "open outcry" auction system. The process is very rapid. More than a hundred liens can be auctioned in an hour. There can be a large number of bidders (sometimes as many as a hundred) for a given lien. No record is kept of the bidders on each lien. When bidders tie at a 0% penalty bid for a particular lien, the auctioneer simply awards the lien to one of the tied bidders. The auctioneer exercises considerable discretion in doing so. The auctioneer may turn or look from time to time to different portions of the auction room, or he may award a lien to the first bidder that he hears shout out a 0% penalty rate after the parcel number has been announced. Petitioners are not aware of any other conceivable factual basis for the allegation that liens are awarded "on a rotational basis."

property owner pays a penalty on those taxes, or when the Tax Buyer is able to obtain a deed for the property after the property owner fails to pay delinquent taxes and penalties for two to three years after the tax sale and the property can then be sold for more than the amount that the Tax Buyer has paid the County. Pet. Br. 6; JA 18-19. But there is no way to determine *ab initio* whether a tax buyer will pay subsequent taxes on a lien, whether or when a property owner will redeem a tax lien, or at what amount of profit, if any, a property will be sold if a deed is obtained by the Tax Buyer.

Respondents also assert that there is no risk that petitioners could be subjected to multiple overlapping damages awards because "[t]he only issue here is how the tax liens will be allocated among identical bidders . . . ." Resp. Br. 56. But as just discussed, nothing in the complaint alleges precisely how liens are awarded when there are multiple lowest-penalty-rate bidders. Moreover, respondents fail to explain how it would be determined that any particular Tax Buyer would receive any particular tax lien—a fact that would need to be known to determine the value of the liens that allegedly should have been obtained by respondents. Nothing in the complaint suggests, let alone establishes, that it would be possible to identify which specific lien would have been allocated to which specific Tax Buyer at any of the tax sales absent the alleged wrongdoing of petitioners.

Nor are respondents necessarily correct in their claim that they are the only "immediate victims" of petitioners' alleged wrongful conduct because the County—the only recipient of the alleged misrepresentations—suffered no damages. Resp. Br. 37. It is far from clear that the County would suffer no harm from the alleged wrongful conduct. For

example, if it became known that the auctions were being conducted in an unfair manner as respondents allege, this presumably would deter potential tax buyers from participating. Reduced participation, in turn, would reduce the demand for tax liens. At some point, this would be expected to result in the County's inability to sell all of its tax liens, injuring the County in an amount equal to the unpaid taxes due under the unsold liens. The County therefore, as the direct recipient of petitioners' alleged misrepresentations, has a significant incentive to bring an action to enforce the SSB Rule, and, as petitioners observed in their opening brief (Pet. Br. 5-6), the Treasurer has expressly reserved to herself the "sole and exclusive discretion" to determine whether registered bidders are "related" within the meaning of the rule.

Even if this Court were to adopt a so-called "target exception" to the reliance-by-the-plaintiff rule to allow claims by direct victims who did not receive or rely on an alleged misrepresentation, such an exception would not help respondents. Because RICO's proximate cause requirement mandates a direct relation between the injury asserted and the injurious conduct alleged, the "target exception" applies only "when the plaintiff can demonstrate injury *as a direct and contemporaneous result* of fraud committed against a third party." *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 223 (5th Cir. 2003) (emphasis added). Respondents plainly could not satisfy this requirement.

Indeed, even assuming that petitioners engaged in the wrongful conduct alleged in the complaint, at least the following additional things would have to occur before respondents could suffer any injury:

1. Petitioners would have to participate in a tax auction in which respondents also participated.

2. At least two petitioners and one or both respondents would have to simultaneously bid the same lowest penalty rate on the same liens.[4]

3. A petitioner would have to obtain a lien that, absent petitioners' alleged wrongful conduct, would have been obtained by respondents and not by petitioners or some other Tax Buyer.

4. The property owner of the property to which that particular tax lien relates would have to fail to redeem the tax lien before either (a) petitioners paid subsequent taxes or (b) two to three years passed and petitioners obtained a tax deed for the property.

5. The property owner would have to pay the subsequent taxes and the associated penalty, or the property would have to be sold at a profit after paying all delinquent taxes and interest.

None of this alleged injury would be "direct and contemporaneous," and respondents therefore could not benefit from any "target exception" to the reliance-by-the-plaintiff rule.

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[4] In a footnote (Resp. Br. 12 n.3), respondents challenge petitioners' observation that respondents still have not identified any specific lien on which two or more named defendants and at least one plaintiff bid a 0% penalty rate and the lien was awarded to one of the defendants. Not surprisingly, the footnote contains no supporting citation.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to dismiss Plaintiffs' civil RICO claims.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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3-19-08

No. 07-210

In the Supreme Court of the United States

JOHN BRIDGE, ET AL., PETITIONERS

v.

PHOENIX BOND & INDEMNITY CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The Court granted certiorari on the following question: Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the plaintiff.

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In the Supreme Court of the United States

No. 07-210

JOHN BRIDGE, ET AL., PETITIONERS

v.

PHOENIX BOND & INDEMNITY CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The question in this case implicates the relationship between the provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) that permits a party injured by a RICO violation to bring a civil action to recover damages, 18 U.S.C. 1964(c), and the federal mail fraud statute, 18 U.S.C. 1341 (Supp. V 2005), which prohibits acts that are included among the predicate acts that may constitute a pattern of racketeering activity under RICO. Because the United States enforces the federal criminal laws, it has a substantial interest in the proper interpretation and application of the mail fraud

statute.[1] The United States filed an amicus brief in *Bank of China, New York Branch* v. *NBM L.L.C.*, No. 03-1559, a case raising a similar question, at the petition stage by invitation of the Court and again at the merits stage.

STATEMENT

Respondents brought this civil action under RICO seeking damages allegedly caused by petitioners' violations of the mail fraud statute, 18 U.S.C. 1341 (Supp. V 2005), in submitting collusive bids in a county's sale of tax liens on properties with delinquent taxes. The district court dismissed the complaint because it concluded that respondents, competitive bidders in the tax-lien sale, were not the recipients of the allegedly false representations to the county and were at best indirect victims of the fraud. Pet. App. 9a-21a. The court of appeals reversed, holding that respondents' allegations established proximate cause and that a civil RICO plaintiff who can establish proximate cause need not also establish that it was a recipient of a false statement. *Id.* at 1a-8a.

1. In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, Tit. IX, 84 Stat. 941 (18 U.S.C. 1961 *et seq.*), to combat the growing influence of organized crime over the national economy. RICO contains both criminal

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[1] The United States does not bring civil actions under 18 U.S.C. 1964(c), see *United States* v. *Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 21-27 (2d Cir. 1989) (holding that the United States is not a "person" who can sue under Section 1964(c)), and the causation requirements imposed by Section 1964(c) do not apply in criminal cases or in civil RICO actions for injunctive relief that the United States brings under Section 1964(a) and (b).

sanctions and civil remedies. Under 18 U.S.C. 1962(c), it is a crime for a person employed by or associated with an enterprise to conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering activity. The racketeering activity covered by the RICO statute includes "any act which is indictable under" the federal mail fraud statute. 18 U.S.C. 1961(1)(B) (Supp. V 2005). Under 18 U.S.C. 1964(c), "[a]ny person injured in his business or property by reason of a violation of section 1962" may bring a civil action in district court and "recover three-fold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

2. This is a civil action commenced by respondents, Phoenix Bond & Indemnity Co. and BCS Services, Inc., in the United States District Court for the Northern District of Illinois. The complaint alleged that petitioners had violated the RICO statute based on predicate acts of mail fraud that formed a pattern of racketeering activity, and that petitioners had suffered injury by reason of that violation. The complaint also alleged a claim under Illinois law for tortious interference with prospective business advantage. Pet. App. 9a-10a, 15a.

Respondents alleged that they regularly buy property tax liens at a competitive auction in Cook County, Illinois. Cook County sells the liens to bidders who pay the delinquent taxes owed on the property. After the lien is sold, the property owners then have the opportunity to redeem the property by paying the delinquent taxes and any statutory penalties assessed. The bidders compete on the basis of the statutory penalty that will be assessed to the owner and result in compensation for the bidders. The penalty rates may range from 0% to 18%, and the winner of the auction is the bid with the lowest

penalty rate. If the property owner does not pay after he is mailed the requisite notices, the lienholder can obtain the deed to the property. Because the potential value of the properties often exceeds the amount of unpaid taxes, multiple bidders routinely submit bids of a 0% penalty. To resolve ties, the County awards liens among those bidders on a rotating basis. To thwart unfair collusion, the County requires all bidders to comply with the "Single, Simultaneous Bidder Rule," which prohibits related entities from submitting bids on the same property at the same auction, and to file an affidavit stating that they are not "related" to any other party, meaning that no other bidder has a "contractual relationship with" the bidder, or has a "shareholder, partner, principal, or officer in common." Pet. App. 1a-3a, 9a-12a.

According to respondents, the petitioners (Sabre Group, LLC, through its principal Barrett Rochman and its tax-sale bidder John Bridge) engaged in a fraudulent scheme, indictable under the federal mail fraud statute, to obtain auctioned liens that otherwise would have been awarded to respondents. The alleged scheme proceeded as follows: petitioners, in violation of the single-bidder rule, created shell companies (some renamed or added over time) that bid at four consecutive auctions. Petitioners and their shell entities misrepresented in their affidavits to the County that they were unrelated entities. As a result, when the County allocated on a rotating basis the liens where a tie had resulted, it treated petitioners and its shell affiliates as independent bidders. Petitioners thus received not only their rightful share of liens but also those awarded to its shell entities, leaving respondents (which had submitted the same 0% bid on those liens) with disproportionately fewer. Petitioners then prepared notices for the County to mail to

property owners to enable petitioners to realize the value of the liens (by obtaining either payment or the deed). Pet. App. 2a-3a, 9a n.1, 12a-14a.

Respondents sought damages equal to the value of the liens they would have received had petitioner and its affiliates complied with the single-bidder rule. Pet. App. 3a, 12a-14a.

3. On petitioners' motion, the district court dismissed the complaint. The district court ruled that because respondents were not the recipients of any of petitioners' misrepresentations, they lacked standing to bring the complaint. Pet. App. 17a-18a. It therefore dismissed respondents' RICO claims with prejudice and declined to exercise supplemental jurisdiction over the state law tort claim. *Id.* at 20a.

4. The court of appeals reversed. Pet. App. 1a-8a. In a unanimous opinion by Chief Judge Easterbrook, joined by Judges Posner and Evans, the court noted that respondents had suffered an "injury in fact" that was redressable by damages, and thus had "standing," because the alleged scheme deprived respondents of liens they otherwise would have received. *Id.* at 3a. The court of appeals then turned to the requirement that a civil RICO plaintiff establish that its injuries were proximately caused by the defendants' violation. *Id.* at 4a (citing *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992)).

The court recognized that proximate causation turns on the answers to "a set of questions," rather than an "algorithm[]." Pet. App. 4a. It asked whether there was a more immediate victim better positioned to sue, whether the existence of an immediate victim would unduly complicate the calculation of damages, and whether the

compensation of respondents would deprive a more deserving victim of recompense. The only such candidate was the County; yet, since the fraud affected only which bidder received individual tax liens, and not how much overall revenue the auction generated, the County suffered no financial loss from the scheme. *Id.* at 5a. Thus, the court concluded, the County could recover no damages and had no incentive to bring suit. Consequently respondents, the "*only* injured parties," were the better enforcer and thus satisfied the proximate cause standard. *Id.* at 5a-6a.

The court of appeals rejected petitioners' claim that respondents could not recover because "no false statements were made to [respondents]." Pet. App. 7a. It reasoned: "A scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's." *Ibid.* The court determined that respondents had sufficiently alleged that they had suffered such an injury, *i.e.*, "direct rather than derivative." *Id.* at 8a. The court also rejected the argument that respondents were outside the "zone of interests" protected by RICO or the mail fraud statute, concluding that argument was "just a different take on the proposition that only recipients of the untruth have a remedy." *Ibid.* The court concluded that "[w]hen the injury satisfies the requirements of *Holmes* and *Anza*, it cannot be knocked out by a zone-of-interests requirement that has no purchase in the text of either § 1341 or RICO." *Ibid.*

SUMMARY OF ARGUMENT

In a civil RICO claim predicated on mail fraud, the plaintiff cannot logically establish causation without showing that *someone* relied on the misrepresentations

in furtherance of the fraud. There is no textual, common law, or policy basis, however, for a requirement that reliance in all cases must be by the *plaintiff* itself. As the facts of this case demonstrate, and consistent with traditional proximate cause principles, a plaintiff's injury can result proximately from a defendant's fraud, even when only a third party has relied on the false representations.

A. Under 18 U.S.C. 1964(c), a civil RICO plaintiff may recover damages if it is injured in its business or property "by reason of" a RICO violation. In *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court construed Section 1964(c)'s "by reason of" requirement and held that a civil RICO plaintiff must prove that a RICO violation proximately caused its injury. Proximate cause, the Court explained, means a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268. As a general matter, a plaintiff alleging a RICO violation based on mail fraud must show reliance on the defendant's misrepresentations to establish that the RICO violation proximately caused its injury. It is a matter of basic logic that a misrepresentation cannot cause—much less proximately cause—injury, unless *someone* (either the plaintiff or a third party) relies upon it.

B. Neither logic nor law supports petitioners' contention that the *plaintiff* itself must rely on the misrepresentations to state a civil RICO claim predicated on mail fraud. It is undisputed that the federal mail fraud statute, 18 U.S.C. 1341 (Supp. V 2005), does not require proof of any reliance. See *Neder* v. *United States*, 527 U.S. 1, 24-25 (1999). Nor does the text of the relevant RICO provisions. Mail fraud constitutes "racketeering activity," 18 U.S.C. 1961(1) (Supp. V 2005), and

"a pattern of racketeering activity" with the requisite relationship to an enterprise violates RICO, 18 U.S.C. 1962. Nothing in the linkage of mail fraud to RICO's liability provisions imports a reliance requirement that neither of those provisions contains separately.

That leaves only the "by reason of" language in Section 1964(c)'s authorization of a civil action for damages. But that language does not provide any textual basis for a requirement of reliance by the plaintiff in a civil RICO action that is predicated on fraud. The "by reason of" connotes a requirement of proximate cause. As a general matter, when a defendant's misrepresentations to a third party cause direct damages to a plaintiff that are neither speculative nor duplicative, the plaintiff has been proximately injured "by reason of" the fraud. Section 1964(c) provides an express cause of action to "[*a*]*ny* person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. 1964(c) (emphasis added). A plaintiff-reliance requirement finds no support in that broad language.

C. The common law should not be invoked to read into the mail fraud statute or Section 1964(c) the element of reliance by the plaintiff. First, the requirements for recovering damages in a common law fraud action have no application to the criminal prohibition in the mail fraud statute. Unlike in *Beck* v. *Prupis*, 529 U.S. 494 (2000), where Congress used the common-law term of conspiracy as the basis for RICO liability, here Congress chose not common law fraud but statutory mail fraud as the predicate acts for a civil RICO action. Second, while this Court in *Holmes* interpreted Section 1964(c)'s "by reason of" language to incorporate common-law principles of proximate causation generally applicable to all torts, it would not make sense to construe

Section 1964(c) to incorporate common-law requirements (such as reliance by the plaintiff) that are specific to just one tort. Third, in any event, it is well-established under the common law that a plaintiff *can* recover for injuries resulting from a competitor's misrepresentations to a third party (*i.e.*, that reliance by the plaintiff is *not* required). See, *e.g.*, *Rice* v. *Manley*, 66 N.Y. 82 (1876); Restatement (Second) of Torts 766B(a) at 20 (1979) (Restatement).

D. A strict and universal plaintiff-reliance requirement does not further the purposes of traditional proximate cause principles, as applied in *Holmes* and *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). As this case demonstrates, a plaintiff in a Section 1964(c) action predicated on mail fraud can allege a direct causal connection between its injury (fewer liens) and the defendant's fraud (lying to the County to acquire more liens) and, as the most immediate victim, avoid the danger of speculative or duplicative damages – even if only a third party (which itself suffered no injury) relied on the fraud.

E. Petitioners' policy concerns do not justify judicial imposition of a plaintiff-reliance requirement that is found nowhere in RICO's text and that contradicts its broad remedial purposes. It is up to Congress, not this Court, to restrict RICO's civil coverage if the legislature believes that the textually broad remedy may be applied too expansively. See, *e.g.*, *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499-500 (1985). In any event, more sensible limitations—the traditional proximate cause principles articulated in *Holmes* and *Anza*; RICO's other elements; Federal Rule of Civil Procedure 9(b)'s requirement of pleading fraud with particularity; and the more generalized reliance requirement inherent in prox-

imate cause—already function to limit Section 1964(c) suits predicated on mail fraud. If additional limits are warranted, they should not originate in judicially fashioned rules that would arbitrarily exclude a class of the most-directly injured victims of a scheme.

ARGUMENT

A CIVIL RICO PLAINTIFF WHO CAN ESTABLISH DAMAGES PROXIMATELY CAUSED BY THE DEFENDANT'S FRAUD NEED NOT ALSO SHOW THAT THE PLAINTIFF ITSELF RELIED ON THE DEFENDANT'S FRAUDULENT CONDUCT

RICO imposes three requirements that a plaintiff must meet to bring a civil action: (1) "injur[y] in his business or property" (2) "by reason of" (*i.e.*, proximate cause) (3) "a violation of section 1962" (*i.e.*, the underlying RICO violation). 18 U.S.C. 1964(c). When the underlying RICO violation consists of acts of mail fraud, general causation principles logically require that *someone* (either the plaintiff or a third party) have relied on the misrepresentations. But petitioners contend that Section 1964(c) imposes an additional requirement that the *plaintiff* itself must have been the one who relied. That contention finds no support in the text of the mail fraud statute or RICO, the common law, traditional proximate cause principles, or policy concerns.

A. Reliance *By Someone* Is Necessary To Establish Causation In A Civil RICO Action Predicated On Mail Fraud

The civil RICO provision, 18 U.S.C. 1964(c), affords a private cause of action to a person injured in his business or property "by reason of" a RICO violation. In *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court, interpreting the phrase "by rea-

son of," declined to permit recovery on a mere showing that the RICO violation was a "but for" cause of the plaintiff's injury. Instead, the Court held that a plaintiff must also show that the RICO violation was the injury's "proximate cause." *Id.* at 265-268. The Court explained that Section 1964(c) was modeled on the federal antitrust laws, which had been read to incorporate common-law principles of proximate causation. *Id.* at 267-268. The Court further explained that "among the many shapes this concept [of proximate cause] took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268 (citation omitted).[2] In *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), this Court, again considering causation in a civil RICO action, held that proximate cause principles prevented "broaden[ing] the universe of actual harms to permit RICO suits by parties who have been injured only indirectly." *Id.* at 460.[3]

Holmes, *Anza*, and this case all involve plaintiffs claiming that defendants caused them injury by conducting the affairs of an enterprise through a pattern of mail (or wire) fraud. A plaintiff cannot establish *any* causal relationship between its asserted injury and

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[2] Applying that principle, the Court held that the Securities Investor Protection Corporation (SIPC) could not, as an "indirectly injured victim," *Holmes*, 503 U.S. at 274, recover for injuries caused to it by a stock-manipulation scheme that disabled two broker-dealers from meeting obligations to customers, thereby triggering SIPC's duty to reimburse their customers. *Id.* at 270-274.

[3] Applying that principle, the Court in *Anza* concluded that the plaintiff—a company claiming that its business rival was defrauding state tax authorities and using the ill-gotten proceeds to undercut its prices—failed to establish proximate cause where the "set of actions (offering lower prices) [was] entirely distinct from the alleged RICO violation (defrauding the State)." 547 U.S. at 460.

a pattern of fraud, much less the "direct relation" that *Holmes* and *Anza* require, absent proof that *someone* (either the plaintiff or a third party) relied on the misrepresentations made in furtherance of the fraud. For example, if the recipient of a misrepresentation in a fraudulent scheme knew that it was false and took an action anyway, the misrepresentation was not the cause (let alone a proximate cause) of any injury resulting from that action. Similarly, if the recipient did not know that a misrepresentation was false but would have taken the same injury-producing actions even had he known, there is no causal connection (let alone "direct relation") between the injury and the misrepresentation. Absent reliance by someone, it is hard to see how deception can cause any injury.[4]

As an analytical matter, reliance does not constitute an independent element of the RICO cause of action; rather, it functions as a logically necessary (though not always sufficient) way of establishing causation specif-

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[4] Reliance may in some circumstances be presumed rather than actual. For example, if a plaintiff's agent or employee is aware of the deception but out of bribery or malice "acts adversely to its principal, the agent's actions and knowledge are not imputed to the principal." *Bank of China, New York Branch* v. *NBM LLC*, 359 F.3d 171, 179 (2d Cir. 2004), cert. dismissed, 546 U.S. 1026 (2005). Likewise, if a defendant makes misrepresentations to an unwitting third party, as by spreading false rumors about a plaintiff's products, see, *e.g.*, *Proctor & Gamble Co.* v. *Amway Corp.*, 242 F.3d 539 (5th Cir.), cert. denied, 534 U.S. 945 (2001), a plaintiff reasonably fearing that those falsehoods would lure away its customers could "recover for expenditures reasonably made or harm suffered in a reasonable effort to avert the harm threatened." Restatement § 919, at 507. Under such circumstances, reliance can be presumed even if no customer in fact relies on the statements because of the corrective actions.

ically tailored to the fraud context. See *Anza*, 547 U.S. at 478 (Thomas, J., concurring in part and dissenting in part) ("the reliance requirement simply functions as a necessary prerequisite to establishing the causation required by the language of 1964(c)" (quoting Brief for Petitioners 29)); cf. *Field* v. *Mans*, 516 U.S. 59, 66 (1995) ("No one, of course, doubts that some degree of reliance is required to satisfy the element of causation inherent in" bankruptcy code provision that prohibits the discharge of debts for money or property "obtained by" fraud.). Given the vast array of criminal acts that qualify as racketeering activity, see 18 U.S.C. 1961(1) (Supp. V 2005), reliance cannot be understood as a general prerequisite to recovery. Instead, it comes into play only when the nature of the underlying racketeering activity makes reliance relevant in the causation analysis under Section 1964(c). That is the case when the RICO violation involves mail fraud. See *Holmes*, 503 U.S. at 288 (Scalia, J., concurring in the judgment) (observing that the proximate-cause test under 18 U.S.C. 1964(c) will "vary according to the nature of the criminal offenses upon which those causes of action are based").

While the causation element naturally entails that *someone* rely on a defendant's misrepresentations in a Section 1964(c) suit predicated on mail fraud, petitioners' contention that *the plaintiff* itself must have been the one who relied on the misrepresentations lacks any similar logical foundation. A defendant can, as this case amply demonstrates, inflict harm on a plaintiff through a third party's reliance on false representations. And, as discussed below, no relevant factor warrants judicial imposition of a "plaintiff-reliance" requirement.

B. Neither The Text Of The Mail Fraud Statute Nor The Text Of RICO Supports Imposition Of A Plaintiff-Reliance Requirement

This case concerns civil RICO claims predicated on acts of mail fraud, indictable under 18 U.S.C. 1341 (Supp. V 2005), as the underlying pattern of racketeering activity. 18 U.S.C. 1961(1)(B) (Supp. V 2005); 18 U.S.C. 1962(c), 1964(c). It is clearly established law that reliance is *not* an element the government must prove to indict or convict a defendant for violating the mail fraud statute. See, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 24-25 (1999) (stating that requiring proof of reliance to establish a "'scheme to defraud' * * * would clearly be inconsistent with the statutes Congress enacted" and thus "the common-law requirement[] of 'justifiable reliance' * * * plainly has no place in the federal fraud statutes"). Even petitioners concede this point. Pet. Br. 18 ("prosecutions under the mail fraud statute require proof of neither reliance nor damages"). Nor do petitioners seriously dispute that the conduct alleged in this case could be charged as a scheme to defraud in violation of the mail fraud statute.[5]

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[5] Petitioners point out that respondents did not receive or rely on any of the specific mailings alleged in the complaint as predicate acts; that those mailings did not include any misrepresentations; and that petitioners themselves did not directly mail anything. Pet. Br. 8, 36. These facts are of no moment. The mailing requirement of the mail fraud statute is satisfied even when the mailed material has not "contributed directly to the duping" of any victim, so long as the use of the mails is "essential to the perpetuation of [the defendant's] scheme." *Schmuck* v. *United States*, 489 U.S. 705, 712 (1989). Routine or innocent mailings "that contain no false information" are more than adequate to satisfy the mailing requirement. *Id.* at 715; *Carpenter* v. *United States*, 484 U.S. 19, 28 (1987); *Parr* v. *United States*, 363 U.S. 370,

Petitioners nevertheless contend that "pleading a violation of the criminal mail fraud statute is not sufficient to establish a predicate act in a civil RICO case." Pet. Br. 17. The text of the relevant RICO provisions does not support that contention. An act indictable under the mail fraud statute is "racketeering activity." 18 U.S.C. 1961(1) (Supp. V 2005). If in addition to proving acts of mail fraud, a plaintiff proves the other elements of Section 1962 (which are not in dispute here), then the plaintiff has established a violation of that section. That, in turn, satisfies the RICO "violation" requirement of the civil provision. 18 U.S.C. 1964(c) (requiring "a violation of section 1962"). There is simply no textual basis for introducing a reliance requirement into Section 1964(c)'s requirement of a RICO violation.

Turning to the causation element of Section 1964(c), the phrase "by reason of" does logically require that *someone* have relied on misrepresentations in a civil RICO action predicated on mail fraud. See Part A, *supra*. Petitioners attempt to use that phrase as the textual hook for a plaintiff-reliance requirement. But the words "by reason of," which have been interpreted to require proximate cause between the plaintiff's injury and the underlying RICO violation, in no way suggest that the plaintiff itself must be the one who relied on the misrepresentations in order to state a claim. On the contrary, when a defendant's fraudulent representations to an innocent third party cause direct damages to a prospective plaintiff that are neither speculative nor

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390 (1960). And the statute requires only that the defendant "cause[]" the mails to be used. 18 U.S.C. 1341 (Supp. V 2005). That petitioners prepared notices of their lien acquisition and provided them to the County for mailing to the property owners thus satisfies the mailing requirement.

duplicative, that plaintiff has, as a general matter, been injured "by reason of" the fraud and thus RICO's plain language generally offers a right of recovery.

Other language in Section 1964(c) supports this conclusion. The statute provides a cause of action for "[*a*]*ny* person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. 1964(c) (emphasis added). As this Court has explained, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Thus, a plaintiff who can otherwise meet the requirements of proximate causation cannot be disqualified, consistent with Section 1964(c)'s textual breadth, solely because the pattern of misrepresentations that directly injured him was directed to a third party. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 495 (1985) ("If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).").

Contrary to petitioners' suggestion, this Court's recent decision in *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008), does not support a plaintiff-reliance requirement under RICO. In *Stoneridge*, the Court held that plaintiff-investors could not maintain an action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), because they did not rely on the conduct of defendants, who were outside suppliers of the investors' company and who facilitated the company's actions, but who lacked control over the company's fraudulent accounting practices and

representations to the market. 128 S. Ct. at 770. *Stoneridge* arose not in a statutory context permitting an express right of recovery for damages caused "by reason of" wrongful conduct, but instead in the context of the *implied* private right of action read into Section 10(b), whose judicially-created nature "caution[s] against its expansion." *Id.* at 773. This Court has long held that a Section 10(b) implied action requires proof of reliance and has interpreted it in parallel with the cause of action Congress provided in 15 U.S.C. 78r(a), which grants recovery only to one "who, in *reliance* upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such *reliance*." 15 U.S.C. 78r(a) (emphases added); see *Basic Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988). Section 1964(c), in contrast, has no such language.

In addition, *Stoneridge* construed Section 10(b) in light of its earlier holding that no implied right of action exists against aiders and abettors, see *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), and Congress's later provision of a right of action against aiders and abettors only for the Securities and Exchange Commission (SEC), not private parties. *Stoneridge*, 128 S. Ct. at 771. The Court expressed concern that recognition of "scheme" liability that dispensed with proof of direct reliance would undermine *Central Bank*'s holding and Congress's limitation of aiding and abetting liability to the SEC. *Ibid.* No similar concern exists here.

Finally, as a matter of proximate causation, *Stoneridge*'s facts differ critically from the facts in this case. In that case, "[i]t was [the issuer], not [the outside supplier defendants], that misled its auditor and filed fraud-

ulent financial statements; nothing [the defendants] did made it necessary or inevitable for [the issuer] to record the transactions as it did." 128 S. Ct. at 770. Here, in contrast, no such intervening act of wrongdoing is present. There is no distance between petitioners and the fraud. Petitioners, not anyone else, were the principals in the fraudulent scheme. The only question is whether the fact that the respondents—though the primary targets of the fraudulent scheme—were not the direct targets of the fraudulent statements, makes them too far removed to recover. It does not. Petitioners' deception of the County led directly and predictably to the award of tax liens to petitioners at the expense of respondents.

C. The Common Law Does Not Support Imposition Of A Plaintiff-Reliance Requirement

Lacking a textual basis, petitioners nonetheless ask this Court to read into either the mail fraud statute or Section 1964(c) the element of reliance by the plaintiff from what they narrowly construe to be common law fraud. Pet. Br. 25-37. For a variety of reasons, that request should be rejected.

1. The mail fraud statute cannot be interpreted to encompass a common-law requirement of plaintiff-specific reliance. The Court has expressly rejected the proposition that reliance is an element of 18 U.S.C. 1341 (Supp. V 2005) in a criminal case, and the mail fraud statute does not take on a different meaning simply because a plaintiff alleges mail fraud as a predicate racketeering act under RICO. See pp. 14-15, *supra*. To be sure, when the underlying predicate offense itself is interpreted in light of the common law, the same common law analysis applies to construing the predicate act in the RICO context. See *Wilkie* v. *Robbins*, 127 S. Ct.

2588, 2605-2607 (2007) (turning to the common law of extortion in construing the Hobbs Act, 18 U.S.C. 1951, as an alleged predicate act under RICO, because of a presumption that Congress meant to incorporate the common law when passing the Hobbs Act); *Scheidler* v. *NOW*, 537 U.S. 393, 400 (2003) (same). But RICO does not justify turning to the common law to overlay further requirements on the meaning of the various predicate acts if the common law does not play that role when the underlying predicate offense stands alone. Here, the mail fraud statute contains no reliance requirement, and the mail fraud statute does not have a different meaning when it is incorporated by reference into RICO.

Beck v. *Prupis*, 529 U.S. 494 (2000), does not suggest otherwise. In *Beck*, this Court interpreted Section 1964(c) in conjunction with 18 U.S.C. 1962(d), which prohibits one from "conspir[ing] to violate" other provisions of 18 U.S.C. 1962. The Court concluded that RICO's reference to conspiracy in the independent substantive prohibitions of the statute should be interpreted in light of common-law conspiracy principles. *Beck*, 529 U.S. at 500-501. But 18 U.S.C. 1961(1) (Supp. V 2005) does not refer to common law fraud as a predicate act; rather, it refers to specific federal fraud statutes, including (but not limited to) 18 U.S.C. 1341 (Supp. V 2005), violations of which constitute racketeering activity. If Congress had wanted to incorporate the limitations of common law fraud, then it presumably would have substituted common law fraud for the federal fraud statutes as a RICO predicate. See 18 U.S.C. 1961(1)(A) (Supp. V 2005) (listing as predicate acts state felony crimes of "murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical"); cf. *Field*, 516

U.S. at 69-75 (noting that Congress's use of common-law term "actual fraud" in bankruptcy code provision indicated its intent to incorporate common-law requirement of justifiable reliance). Accordingly, *Beck* does not support importation of additional limiting principles unique to common law fraud when federal mail fraud is the predicate for a Section 1964(c) suit. See *Anza*, 547 U.S. at 475-478 (Thomas, J., concurring in part and dissenting in part) (refusing to read a common law reliance requirement into civil RICO actions predicated on mail fraud).

2. Section 1964(c) of the RICO statute also does not incorporate any common law requirement of reliance by the plaintiff. It is true that the Court looks to the common law to inform its interpretation of that provision and has adopted common law principles of proximate causation in that endeavor. See *Holmes*, 503 U.S. at 268 (interpreting "by reason of" to incorporate common law principles of proximate causation). But it has done so only in interpreting textual requirements and nothing in the relevant text provides a hook for importing a categorical plaintiff-reliance requirement into Section 1964(c).

At the time of RICO's passage, proximate cause was understood to be an "essential element" of any common law tort. William L. Prosser, *Handbook on the Law of Torts* § 41, at 236 (4th ed. 1971). Reliance (let alone reliance by the plaintiff), however, is not an element of all torts. It seems unlikely that Congress intended civil RICO courts to have to search for the best analogy to a single common law tort in order to frame causation rules under Section 1964(c). RICO's predicate acts are crimes that often may have no single or precise common law analog. And it would undercut RICO's broad remedial

aims in dealing with structured criminal activity that caused private harm to tie RICO's remedy exclusively to the common law. It is thus implausible that Congress intended to incorporate common law requirements (such as reliance by the plaintiff), tailored to each individual tortious act, as part of the statute's general proximate cause standard.

Even if this Court were inclined to incorporate new tort-specific requirements from the common law into Section 1964(c)'s causation element, it is well established under the common law that third-party reliance suffices in this context. The proper point of reference when mail fraud is the predicate is not what petitioners narrowly consider to be common law fraud, but rather the related group of common law torts that capture the broader range of conduct proscribed by 18 U.S.C. 1341 (Supp. V 2005). The federal mail fraud statute has long been interpreted to extend beyond common law fraud or its criminal counterpart, false pretenses. See, *e.g.*, *Neder*, 527 U.S. at 25; *Durland* v. *United States*, 161 U.S. 306, 313 (1896). Consequently, the common law analogs to mail fraud include not only common law fraud but also related torts sounding in fraud, such as tortious interference, where the only requirement is that someone have relied on the misrepresentation.

Common law courts recognized no gap in protection that left plaintiffs who were directly victimized by fraudulent conduct without a remedy simply because the misrepresentations were made to a third party. To the contrary, common law courts have long permitted such suits. For example, in *Rice* v. *Manley*, 66 N.Y. 82 (1876), the defendant learned that the plaintiff had made an oral agreement to buy a "large quantity of cheese" from a third party. *Id.* at 84. The defendant sent a

telegraph in the plaintiff's name that fraudulently represented that the plaintiff no longer wanted the cheese, thereby inducing the third party to sell his cheese to the defendant instead. *Ibid.* The Court of Appeals of New York, in what the syllabus called "an action for fraud," found the defendant liable. *Id.* at 83. The court reasoned that "it matters not whether the false representations be made to the party injured or to a third party, whose conduct is thus influenced to produce injury." *Id.* at 87. This case—where petitioners' false statements were made to the County, with the intention to influence it to produce injury to rival bidders—represents the twenty-first century version of *Rice*.

Nor is *Rice* by any means an outlier. See Resp. Br. 26-29 (discussing numerous common law cases granting relief where plaintiff was injured as a result of misrepresentations to third parties); see also, *e.g.*, *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 151 U.S. 1 (1894) (plaintiff entitled to damages where defendant interfered with its contract through wrongful conduct, including misrepresentations to a third party (the state legislature)).

Whether modern treatises label such conduct as fraud, tortious interference, or some other tort, there is no question that the common law provided a cause of action to redress the defendant's obtaining of business at the expense of another through a fraudulent misrepresentation to an innocent third party. See Restatement § 766B(a) at 20 (imposing liability for "intentionally and improperly interfer[ing] with another's prospective contractual relation" even if conduct directed at "a third person"); *id.* § 767, cmt. c at 30 (noting that "[f]raudulent misrepresentations" are "a wrongful means of interference," specifically the "inducing [of] a third person

by fraudulent misrepresentation not to do business with the" injured party). Related, overlapping torts also cover misrepresentations directed at third parties. See *id.* § 623A & cmt. a at 334-335 (defining "injurious falsehood" as publication of "a false statement harmful to the interest of another," including misstatements made to governmental third parties); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 130, at 1013-1015 (5th ed. 1984) (discussing various torts covering such conduct under heading of "unfair competition"). Indeed, the common law provided that any "intentional causing of damage is a tort unless justified." Charles E. Carpenter, *Interference with Contract Relations*, 41 Harv. L. Rev. 728, 731 n.13 (1927-1928); see Restatement § 870, at 279; *id.* § 435A, cmt. a at 454 (1965) (recognizing residual tort liability for anyone "who intentionally causes injury to another," including "where a person defrauds another for the purpose of causing pecuniary harm to a third person"). The type of fraudulent conduct at issue therefore falls comfortably within the scope of common law tort liability.

In sum, by the time of RICO's enactment in 1970, it was well established that a plaintiff could recover in tort where, like here, it was directly injured by misrepresentations made to and relied upon solely by a third party. There is thus no reason to presume that Congress intended to import a nontextual and novel plaintiff-reliance requirement into Section 1964(c) actions predicated on mail fraud.

D. Traditional Proximate Cause Principles, As Applied In *Holmes* and *Anza*, Do Not Support Imposition Of A Plaintiff-Reliance Requirement

The common law requirement of proximate cause ensures that "a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct." 1 J. G. Sutherland, *Law of Damages* 57 (1882). A plaintiff-reliance requirement is a poor proxy for proximate cause: taking this very case, it is plain that respondents' injury was the "natural, ordinary, and reasonable consequence" of petitioners' fraudulent scheme. *Holmes* and *Anza* bar a plaintiff from recovering when the defendant's pattern of racketeering activity may be the but-for cause of its injury but when independent factors make it difficult to determine factual causation, it would be too complicated to ascertain or apportion the damages, or a more immediate victim can be expected to sue. *Anza*, 547 U.S. at 458-460; *Holmes*, 503 U.S. at 269-270. Consistent with traditional proximate cause principles, those factors function to limit any RICO action, and thus will screen out some suits involving third-party reliance. None of those potential bars applies here, however, and a *per se* bar to third-party reliance conflicts with the general principle that a directly injured party may invoke RICO's protections.[6]

First, despite the fact that petitioners directed their misrepresentations at the County, the causal chain between petitioners' misrepresentations and respondents' injury here is quite direct. Respondents allege that petitioners, by falsely representing to the County that

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[6] Petitioners have not sought review of the court of appeals' proximate cause analysis (applying *Holmes* and *Anza*), apart from the issue of reliance by the plaintiff.

they were in compliance with the single-bidder rule, received more tax liens and respondents thus received fewer tax liens than they otherwise would have received from the auction. No other intervening factors are at play. While the County was the target of the misrepresentation, there is little doubt that competitors like respondents were the direct target of petitioners' scheme. By contrast, the causal chains between the alleged RICO violations and plaintiff's injury in both *Holmes* and *Anza* were far more attenuated. In *Holmes*, the plaintiff-insurer was injured "only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims," leaving a court to discern whether other factors (such as poor business practices) affected the broker-dealers' insolvency. 503 U.S. at 271-273. In *Anza*, a court would have been called on to speculate to what extent withheld sales taxes allowed one party to undercut another's prices, and to what extent that caused consumers to prefer the defrauder's products. 547 U.S. at 458-459. No such speculative economic leaps are needed here because "the relationship between the alleged RICO violation and the alleged injury is clear." *Id.* at 467 (Thomas, J., concurring in part and dissenting in part).

Second, and relatedly, the damages in this case are not speculative or unascertainable. There is no reason to believe that with proper discovery an expert could not determine how many of the liens awarded to petitioners would have been awarded to respondents absent the fraud, and the expected profit from those additional liens. See Washington Legal Foundation Amicus Br. 14 n.4 ("The unique bidding system allegedly employed by the Treasurer's Office means that one can accurately

predict how tax liens will be allocated among bidders based on an examination of all bids."). Courts have been making such estimates for over a century. See *Rice*, 66 N.Y. at 87-88 (estimating based on market rate plaintiff's profits on cheese he was unable to purchase due to defendant's misrepresentation to third party). Potential damages determinations in *Holmes* and *Anza* were not nearly so straightforward. 503 U.S. at 273; 547 U.S. at 458-459.[7]

Finally, because no other party has been injured here, no other party is better positioned to sue. Although the County was the recipient of petitioners' misrepresentations, it cannot sue under Section 1964(c) because it has not been injured in its business or property. Because the complaint alleges that all parties submitted the same bid (0% penalty) on the liens at issue, the County generates the same revenue and the taxpayer seeking to redeem his property pays the same amount, regardless of who is awarded the lien. Accordingly, there is no danger of duplicative recovery or complex apportionment issues either. In *Holmes*, by contrast, another group of plaintiffs—the more directly injured broker-dealers—had in fact filed suit. 503 U.S. at 273. In *Anza*, the State of New York would have had substantial incentive to sue because it "was being de-

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[7] If petitioners and respondents were the only bidders and petitioners employed a single front company (such that all three bidders offered a 0% penalty on the same tax liens), it would be clear that petitioners received two-thirds of the liens when they should have received only one-half. Injecting additional bidders and additional front companies complicates the math only a bit. It certainly does not involve the complicated or speculative damages theories that proximate cause requirements seek to root out.

frauded and * * * lost tax revenue as a result." 547 U.S. at 458.

In sum, despite their lack of personal reliance, respondents, more than any other potential plaintiff, suffered a clear and ascertainable injury as a direct result of petitioners' alleged scheme. Traditional proximate cause principles, as applied in *Anza* and *Holmes*, require nothing more.

E. Policy Concerns Do Not Support Imposition Of A Plaintiff-Reliance Requirement

Petitioners (and their amici) essentially ask this Court to write into RICO a plaintiff-reliance requirement, found nowhere in the statute or the relevant common law, out of concern for the purported proliferation of civil RICO suits. That request disregards RICO's broad purposes and fails to distinguish between meritorious and meritless suits in any sensible way.

As an initial matter, such a request is properly directed to Congress, and not to this Court. In *Sedima*, the Court addressed the very concerns raised here by petitioners: that, due primarily to the breadth of predicate offenses such as mail fraud, civil RICO had become "a tool for everyday fraud cases brought against respected and legitimate 'enterprises'" and "evolv[ed] into something quite different from the original conception of its enactors." 473 U.S. at 499-500. The Court nevertheless made clear that, even assuming the validity of those concerns, the "correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it." *Ibid.*; see, *e.g.*, *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989) ("[R]ewriting [RICO] is a job for Congress, if it is so inclined, and not for this Court."). Moreover, Con-

gress has shown itself perfectly capable of restricting civil RICO when it so desires. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 107, 109 Stat. 758 (amending RICO to prohibit use of Section 1964(c) based upon a defendant's "conduct that would have been actionable as fraud in the purchase or sale of securities" unless a defendant has been criminally convicted in connection with the fraud).

Absent a reason in the statute for withholding relief, this Court should give effect to Congress's intent that RICO's "self-consciously expansive language * * * 'be liberally construed to effectuate its remedial purposes.'" *Sedima*, 473 U.S. at 498 (quoting RICO, Pub. L. No. 91-452, § 904(a), 84 Stat. 947). Congress through RICO intended to strike broadly against corrupt business practices. In particular, "competing organizations"—"both 'legitimate' and 'illegitimate'"—were among the victims explicitly intended as beneficiaries of the statute's protections. *Beck*, 529 U.S. at 496 (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923); *Sedima*, 473 U.S. at 499. "The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Sedima*, 473 U.S. at 498. It was "in part designed to fill prosecutorial gaps." *Id.* at 493. There is thus no reason to believe that Congress would have intended to exempt from RICO's broad reach suits like this one—targeted at a "competing organization" engaged in fraudulent "racketeering activity" that caused direct business injury, yet escaped criminal prosecution.[8]

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[8] Petitioners' theory would bar relief if organized crime took over a small trash-hauling company and sought to expand its business at the

In any event, petitioners' policy concerns do not warrant a categorical plaintiff-reliance requirement for Section 1964(c) suits predicated on mail fraud. Several limitations already prevent far-flung plaintiffs from transforming any and all misrepresentations into a civil RICO suit.

First, as discussed above in Part D, *Holmes* and *Anza* articulate traditional proximate cause principles that function rationally and directly to limit RICO suits predicated on mail fraud involving third-party reliance that involve remote or speculative injuries. In many cases, a plaintiff who did not himself receive or rely on misrepresentations will be unable to show that the defendant's scheme to defraud proximately caused his injuries. See, *e.g.*, *Anza*, *supra*; *Holmes*, *supra*; *Summit Props. Inc.* v. *Hoechst Celanese Corp.*, 214 F.3d 556, 558-562 (5th Cir. 2000) (home purchasers not directly injured by misrepresentations of manufacturers of building materials), cert. denied, 531 U.S. 1132 (2001); *Appletree Square I, Ltd. P'ship* v. *W.R. Grace & Co.*, 29 F.3d 1283, 1285-1286 (8th Cir. 1994) (same for purchaser of building containing asbestos). A plaintiff-reliance requirement, by contrast, is an exceptionally blunt tool for limiting suits by remote plaintiffs and an inadequate substitute for the proximate cause analysis.

Second, not just any violation of the mail fraud statute entitles a party—even one directly injured through someone's reliance on the fraud—to bring a Section

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expense of a rival trash hauling firm by mailing disparaging statements about that firm to its customers, or by calling those customers and falsely representing that the incumbent trash hauler was going out of business or raising its rates. It is difficult to imagine why Congress would have wanted to prevent recovery by firms injured through such activity.

1964(c) claim. The potential plaintiff must satisfy all the other elements of a RICO violation: participation through "a pattern of racketeering activity" in an "enterprise" "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(c). A single fraud, even one designed to injure a competitor, thus cannot establish a RICO violation. See, *e.g.*, *Systems Mgmt., Inc.* v. *Loiselle*, 303 F.3d 100, 105 (1st Cir. 2002); *Skycom Corp.* v. *Telstar Corp.*, 813 F.2d 810, 818 (7th Cir. 1987).

Third, Federal Rule of Civil Procedure 9(b) requires that all civil pleadings containing "averments of fraud" be stated with "particularity." The courts of appeals have uniformly read this provision to require that civil RICO claims based on violations of federal fraud statutes be pleaded with particularity. See *Odom* v. *Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir.), cert. denied, 128 S. Ct. 464 (2007); *Tal* v. *Hogan*, 453 F.3d 1244, 1263 (10th Cir. 2006), cert. denied, 127 S. Ct. 1334 (2007); *Figueroa-Ruiz* v. *Alegria*, 896 F.2d 645, 648 n.3 (1st Cir. 1990); *Old Time Enters., Inc.* v. *International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989). That requirement provides yet another means for courts to winnow meritless Section 1964(c) claims at the earliest stages of litigation. Cf. *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955 (2007).

In light of these limitations, a judicially-inferred plaintiff-reliance requirement—on top of the textually-grounded generalized reliance requirement inherent in the element of proximate cause for Section 1964(c) claims predicated on mail fraud (see Part A, *supra*)—would accomplish little beyond eliminating suits, like the present one, that fall well within both the broad terms and purposes of RICO.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 07-210

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In the Supreme Court of the United States

JOHN BRIDGE, ET AL.,

Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the plaintiff.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This case presents the question of whether civil claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") based on mail fraud should be easier to plead and prove than analogous claims under state common law.[1] The defendants correctly ask the Court to interpret mail fraud claims under RICO in accordance with the common law, which requires a plaintiff to prove detrimental reliance on a misrepresentation of the defendant. The plaintiffs, by contrast, ask the Court to dispense with the common-law requirement of reliance, thereby making it easier to prove the fraud element of a RICO claim than to prove common-law fraud. The implications of this position are sweeping: if fraud were easier to prove under RICO than under the common law, defendants would face an avalanche of treble-damages suits at the hands of plaintiffs far removed from any alleged misrepresentation, and RICO would federalize another vast swath of ordinary state tort and contract law.

This Court has already held that both RICO and the federal mail fraud statute must be interpreted in light of the common-law meaning of the terms they employ. For example, in *Holmes* v. *Secs. Investor Prot. Corp.*, 503 U.S. 258 (1992), the Court held that a plaintiff must satisfy the common-law standard of

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, the *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to preparation or submission of this brief.

proximate cause to establish injury "by reason of" a RICO violation—even though "[t]his language c[ould], of course, be read to mean that . . . the defendant's violation was [merely] a 'but for' cause of [the] plaintiff's injury." *Id.* at 265-66. Similarly, in *Neder* v. *United States*, 527 U.S. 1, 23 (1999), the Court held that the federal mail fraud statute incorporated the common-law requirement of a *material* misrepresentation—even though the statute never mentions materiality. Finally, in the analogous context of federal securities fraud, the Court has consistently looked to the common law of civil fraud and required a showing of reliance. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231, 243 (1988). All of these decisions are supported by "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Neder*, 527 U.S. at 23; see also *Beck* v. *Prupis*, 529 U.S. 494, 500 (2000) (noting that RICO is interpreted in light of the settled meaning of the common-law terms it employs).

The Court should follow the same approach here. Although neither RICO nor the mail fraud statute *expressly* mentions reliance, reliance has long been an established element of a common-law civil fraud claim. See, e.g., *Brackett* v. *Griswold*, 112 N.Y. 454, 455 (1889) (noting the requirement of reliance). Under the "common-law meaning" rule, then, the Court "must presume that Congress intended to incorporate [reliance]" as an element of a civil RICO claim based on mail fraud. *Neder*, 527 U.S. at 23.

This conclusion also makes sense as a matter of policy. First, as noted, absent a reliance requirement, RICO claims based on mail and wire fraud would rapidly federalize a large segment of ordinary

state tort and contract law. Moreover, a reliance requirement would prevent plaintiffs from using RICO as a form of insurance against ordinary business losses or as an additional (and unnecessary) source of private-attorney-general litigation. Such litigation is especially unnecessary where, as here, the government is perfectly capable of punishing the alleged fraud. Finally, recognizing a reliance element would prevent plaintiffs from using questionable fraud claims, along with the threat of immense liability through treble damages, as a means of harassing their legitimate business competitors.

Such a limit on the scope of fraud claims under RICO is especially important to the Chamber of Commerce of the United States of America (the "Chamber") which, as the world's largest business federation, represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy, and transacting business throughout the United States as well as in many countries around the world. While consistent and disciplined application of RICO is important to deter and remedy the wrongdoing prohibited by the statute, there are some who would misuse the statute against businesses and other organizations, in large part because of civil RICO's treble damages provisions.

The Court of Appeals' holding in this case—that a plaintiff alleging injury "by reason of" fraudulent conduct need not prove his own reliance on such conduct—extends RICO far beyond its intended breadth as well as the limits of sound policy. Reversing that decision will provide an important check against misuse of the civil RICO statute—a check that is con-

sistent with congressional purpose and this Court's precedents—while allowing recovery by those the statute is designed to protect. Accordingly, the Chamber and its members have a strong interest in seeing the decision below reversed.

STATEMENT

The issues in this case are best understood in light of RICO's history and purposes, as well as the events leading up to the decision below.

1. Congress enacted RICO in 1970 to protect legitimate businesses against competitive injury at the hands of organized crime. *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 494-500 (1985); *H.J. Inc.* v. *Northwestern Bell Tele. Co.*, 492 U.S. 229, 245 (1989) ("Organized crime was without a doubt Congress' major target" in enacting RICO). As the Senate Judiciary Committee Report on the bill explained, RICO "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce. It seeks to achieve this objective by the fashioning of new criminal and civil remedies and investigative procedures." S. Rep. No. 91-617 at 76 (1969).

One of those remedies is a civil damages provision, which allows a party "injured in his business or property by reason of" racketeering activity to bring a private suit for treble damages and attorneys fees. 18 U.S.C. § 1964(c). The purpose of this provision is, as this Court recently observed, to encourage private parties to investigate potential RICO violations and compensate those parties that suffer injury as "the *direct* result of" racketeering activity. *Anza* v. *Ideal*

Steel Supply Corp., 126 S. Ct. 1991, 1998 (2006) (emphasis added).

2. This case involves a suit for alleged racketeering activity that was neither directed to, nor directly harmed, a private party. It arises from a dispute over tax sales in Cook County, Illinois.

When property owners in Cook County fail to pay their property taxes, the County acquires a tax lien on the property. Rather than attempt to collect the tax directly from the property owner, the County sells the tax lien to third parties at an auction. The winning bidder pays the delinquent taxes to the County and acquires the right to collect the amount paid, plus interest and a penalty, from the property owner. If the owner is unable to pay, the lien holder can obtain a tax deed and thus becomes the property's new owner. See *Phoenix Bond & Indem. Co.* v. *Bridge*, 477 F.3d 928, 929 (7th Cir. 2007).

The auctions for tax liens are highly competitive. The bids are stated as percentage penalties that the property owner must pay (on top of taxes and interest) to the winning bidder to clear the lien, and the winner is the bidder who is willing to accept the smallest penalty. Many bidders submit offers at the statutorily imposed minimum of 0%, expecting to make a profit not by collecting a penalty, but by taking title to (and eventually selling) a certain percentage of the properties for which they purchase the liens. *Ibid.*

Because the County typically receives multiple bids at a 0% penalty, it allocates tax liens equally among the low bidders. This creates an incentive for single entities to submit multiple bids for each prop-

erty, either on their own or through an agent. To prevent bidders from doing so (and thus receiving a disproportionate share of liens), the County promulgated the "Single, Simultaneous Bidder Rule" (or "SSB Rule"), which requires each bidder to submit an affidavit declaring that it is not related to any other entity participating in the auction. *Id.* at 929-30.

3. Phoenix Bond & Indemnity Co. and BCS Services, Inc. ("plaintiffs") filed this suit against a variety of corporate and individual defendants, alleging that they violated the SSB Rule by agreeing to submit multiple bids in the auctions and later transfer the liens they acquired to a single entity. As part of this scheme, the defendants allegedly submitted false affidavits to the County asserting their compliance with the SSB Rule and thus received a disproportionate share of tax liens—harming their competitors, including the plaintiffs. The plaintiffs asserted that the false affidavits presented to the County, along with letters sent to property owners notifying them that the liens had been sold, constituted mail fraud—a form of "racketeering activity" for purposes of RICO. 18 U.S.C. § 1961(1)(B). According to the plaintiffs, because they had been harmed "by reason of" the defendants' mail fraud, they were entitled to treble damages and attorneys fees under RICO. *Id.* § 1964(c).

The district court dismissed the complaint for lack of standing, 2005 U.S. Dist. LEXIS 34912 (N.D. Ill. Dec. 21, 2005). According to the district court, because the plaintiffs "were not recipients of the alleged misrepresentations," they were only "*indirect* victims of the alleged fraud . . . and therefore . . . lack[ed]

standing to bring the alleged RICO claims." *Id.* at *17-18 (emphasis added).

The Seventh Circuit reversed, concluding that the plaintiffs did not need to prove that they received or relied on a misrepresentation of the defendants. 477 F.3d at 932. According to the Court of Appeals, the plaintiffs, as "losing bidders, . . . acquire fewer tax liens than they would if the [SSB] Rule were followed." 477 F.3d at 931. According to the Seventh Circuit, this was sufficient to demonstrate that the plaintiffs were injured "by reason of" the defendants' mail fraud, even if the plaintiffs never received or relied on a misrepresentation of the defendants. *Id.* at 932.

SUMMARY OF ARGUMENT

The Court of Appeals erred in holding that a plaintiff's reliance is not an element of a civil RICO claim predicated on mail fraud.

I. Although neither RICO nor the mail fraud statute uses the term "reliance," RICO necessarily incorporates an element of reliance under "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses"—including the element of "proximate cause" and the term "fraud." *Neder* v. *United States*, 527 U.S. 1, 23 (1999). By the time the civil RICO statute was enacted in 1970, reliance was a "well-settled" element of a private civil action for fraud. It also was (and is) a necessary element of the proximate cause showing that this Court has required under RICO. *See Holmes* v. *Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992); *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). Consequently, the element of

general reliance is properly incorporated into civil RICO claims based on mail fraud.

The Court should also hold that RICO requires a specific showing of reliance *by the plaintiff* rather than a third party. This is how courts interpreted the reliance element of common-law fraud at the time RICO was enacted, and it remains so today. And, under the "common-law meaning rule," absent text or structure to the contrary (of which there is none), this settled understanding of proximate cause in the fraud context is incorporated into civil RICO claims based on mail fraud. *See Neder*, 527 U.S. at 23 & n.7.

Finally, analogous decisions interpreting Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and SEC Rule 10b-5—which have language indistinguishable from that of the federal mail fraud statute—have also incorporated the common-law element of reliance. As the Court recently explained in *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 128 S. Ct. 761 (2008), "[r]eliance by the plaintiff upon the defendant's deceptive acts . . . ensures that, for liability to arise, *the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability*." *Id.* at 769 (emphasis added) (quoting *Basic Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988)). The same is true in the context of a civil RICO claim based on mail fraud.

II. Public policy also supports the recognition of reliance as an element of civil RICO claims based on mail fraud. First, rejecting the common-law element of reliance would federalize a vast swath of ordinary state tort and contract law. A wide variety of state-

law claims—such as claims for unfair competition, tortious interference with contract, commercial disparagement, products liability, misappropriation of trade secrets, and breach of fiduciary duty, to name just a few—could be brought instead as a civil RICO claim based on mail fraud, along with the powerful threat of treble damages and attorneys fees. This Court has repeatedly warned against interpreting federal statutes in a manner that intrudes "in[to] areas already governed by functioning and effective state-law guarantees." E.g., *Stoneridge*, 128 S. Ct. at 770-71.

Second, recognizing the element of reliance would prevent plaintiffs from using RICO as a form of "broad insurance against [business] losses"—a practice this Court has condemned in similar contexts. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005). The plaintiffs' reading of the statute would provide an incentive for parties to engage in risky transactions they know or suspect to involve fraud, safe in the knowledge that, if the transactions go badly, they can always resort to broad civil RICO claims based on mail or wire fraud—along with the prospect of treble damages. Requiring a showing of actual reliance in fraud claims would help prevent this statutory abuse.

Third, recognizing the element of reliance would help prevent RICO from becoming an additional source of private-attorney-general, *qui tam*–type litigation. Under the plaintiffs' reading of the statute, virtually anyone who can allege injury by mail or wire fraud directed at a governmental agency could bring a civil RICO claim based on that conduct—regardless of the government's interest in enforcing

its own laws. Here, however, there is no basis to conclude that Congress intended to authorize such a claim, and no reason to think that the County is unable to enforce its own regulations.

Finally, recognizing the element of reliance would prevent plaintiffs (or potential plaintiffs) from using questionable RICO fraud claims—together with the threat of treble damages and attorneys fees—to extort settlements from legitimate businesses. Unlike the government, RICO plaintiffs are not constrained by prosecutorial accountability and have every incentive to push civil mail and wire fraud claims to the limit. A reliance requirement would allow courts to weed out weak claims on motions to dismiss or summary judgment and reduce undue pressure on innocent defendants to settle.

ARGUMENT

RICO is a comprehensive statutory scheme that authorizes civil suits based on a pattern of "racketeering activity," broadly defined to include more than 100 predicate acts. 18 U.S.C. § 1961(1). To recover treble damages under the civil RICO statute, a plaintiff must plead and prove that it was "injured in his business or property *by reason of*" a violation of RICO's prohibitions on racketeering activity, including, as in this case, mail fraud. 18 U.S.C. § 1964(c) (emphasis added); §§ 1341, 1961(1).

This Court has consistently and correctly refused to give the phrase "by reason of" its broadest possible meaning. For example, in *Holmes* v. *Secs. Investor Prot. Corp.*, 503 U.S. 258 (1992), the Court construed that phrase to require a showing "that the defendant's violation not only was a 'but for' cause of his

injury, but was the proximate cause as well." *Id.* at 268; see also *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). The application of this common-law requirement in the civil RICO context is designed to ensure "some *direct relation* between the injury asserted and the injurious conduct alleged." *Id.* at 1996 (emphasis added).

In the civil fraud context, the same need for a "direct relation between the injury asserted and the injurious conduct alleged" has long been embodied in the common-law requirement that a plaintiff demonstrate its own reliance on the defendant's alleged misrepresentation. As we now show, this common-law requirement should apply equally to civil RICO claims predicated on mail fraud. That conclusion is compelled by the "common-law meaning" rule as well as pertinent policy considerations.

I. Under The "Common-Law Meaning" Rule, A Civil RICO Claim Predicated On Mail Fraud Requires Proof Of The Plaintiff's Own Reliance.

In the decision below, the Seventh Circuit held that the proximate cause element required by *Holmes* and *Anza* does not require a showing of reliance by the plaintiff. As the court acknowledged, however, the circuits are divided on this issue. 477 F.3d at 932-33.[2] In subsection A, we explain why the proxi-

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[2] The Court noted that the Sixth and Eleventh Circuits have held that reliance is an element of a civil RICO claim predicated on mail fraud, while the First, Second, and Fourth Circuits have rejected that view. Compare *Vandenbroeck* v. *CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000); and *Sikes* v. *Teleline*, 281 F.3d 1350, 1360 (11th Cir. 2002); with *Sys. Mgmt.*,

mate cause element articulated in *Holmes* and *Anza* requires a showing of reliance on the defendant's fraudulent misrepresentation. In subsection B, we explain why the reliance element must be understood, consistent with the concept of proximate cause in the context of common-law fraud, to require a showing of reliance *by the plaintiff*. And in subsection C, we explain why analogous cases from the federal securities fraud context support this requirement of reliance.

A. The Civil RICO Statute Requires A Showing Of Reliance Whenever The Claim Is Based On Mail Fraud.

Reliance is a necessary element of the proximate cause analysis in the civil RICO context when the claim is based on mail fraud. This conclusion follows from the principle that Congress is presumed to incorporate the settled meanings of the common-law terms it uses—a principle that governs the interpretation of both the mail fraud statute and RICO.

1. This Court applied the common-law meaning rule in *Neder* v. *United States*, 527 U.S. 1 (1999), which addressed whether the federal mail and wire fraud statutes incorporated the common-law fraud element of "materiality." Neither statute uses the term "material," but this did not end the Court's analysis. Rather, the Court turned to the "well-

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Inc. v. *Loiselle*, 303 F.3d 100, 103-04 (1st Cir. 2002); *Ideal Steal Supply Corp.* v. *Anza*, 373 F.3d 251, 263 (2d Cir. 2004); *Atlantic Telecom, Inc.* v. *Long Distance Services, Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994). As the Petitioner's Brief points out (at 29-33), however, more recent cases from the Fourth, Fifth, and Eighth Circuits have required reliance.

established rule of construction that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court *must* infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Id.* at 21 (quotation and citations omitted) (emphasis added).

Applying this "well-established rule of construction," the Court emphasized that "both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud . . . statute[], actionable 'fraud' had a well-settled meaning at common law" and that meaning "required a misrepresentation or concealment of *material* fact." *Neder*, 527 U.S. at 22 (emphasis in original). In light of this common-law requirement, the Court held that it "must presume that Congress intended to incorporate materiality [into the mail fraud statute] 'unless the statute otherwise dictates.'" *Id.* at 23 (quoting *Nationwide Mut. Ins.* v. *Darden*, 503 U.S. 318, 322 (1992)).

Once this presumption attaches, the Court explained, the party opposing it bears a heavy burden. Specifically, any "rebuttal [to this presumption] can only come from the text or structure of the fraud statutes themselves"—not by implication from other statutes. *Id.* at 23 n.7. Ultimately, the Court held that "materiality of falsehood *is* an element of the federal mail fraud [and] wire fraud . . . statutes" because the Government "failed to show that [the] lan-

guage [of these statutes] is inconsistent with a materiality requirement." *Id.* at 25 (emphasis added).[3]

2. The same rule of "common-law meaning" applies when interpreting RICO. In *Beck* v. *Prupis*, 529 U.S. 494, 500 (2000), the Court confronted the question of "what it means to be 'injured . . . by reason of a 'conspir[acy]'" in the civil RICO context. Although it was undisputed that the plaintiff had suffered an injury proximately caused by an overt act in furtherance of the conspiracy—namely, termination of his

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[3] As *Neder* pointed out, in criminal prosecutions brought directly under the mail fraud statute, the prosecutor need not show a "completed fraud" with resulting injury, but only a "scheme to defraud." *Neder*, 527 U.S. at 24-25. Accordingly, the Court found that Congress did not intend to incorporate the common-law fraud elements of reliance and damages into the *criminal* mail fraud statute. *Ibid.* This case, however, presents a *civil* RICO claim for treble damages under 18 U.S.C. § 1964(c), which requires not only a showing of injury, but also an injury proximately caused by a predicate act of mail fraud. *Holmes*, 503 U.S. at 268-69. In such a case, the Court has held that it "should look to . . . civil, [not criminal,] common-law principles to interpret [§ 1964(c)]." *Beck* v. *Prupis*, 529 U.S. 494, 501 n.6 (2000). Thus, the fact that *criminal* mail fraud under 18 U.S.C. § 1341 does not require reliance is irrelevant. Rather, "[t]he obvious source in the common law for the . . . meaning of [§ 1964(c)] is the law of civil [fraud]," *ibid.*—which, as we explain below, unequivocally requires reliance. See also *Summit Props. Inc.* v. *Hoechst Celanese Corp.*, 214 F.3d 556, 559 (5th Cir. 2000) ("[T]he government can punish unsuccessful schemes to defraud because the underlying mail fraud violation does not require reliance, but a civil plaintiff 'faces an additional hurdle' and must show an injury caused 'by reason of' the violation."); *United States* v. *Rowe*, 56 F.2d 747, 749 (2d Cir. 1932) (L. Hand, J.) ("Civilly of course the action [for fraud] would fail without proof of damage, but that has no application to criminal liability.").

employment in an effort to cover up the scheme—the Court held that this was not enough. Rather, the "well-established common law of civil conspiracy" required not just any overt act, but "an act that was itself tortious." *Id.* at 500-01. The source of this requirement was not the express text of RICO, but the fact that "when Congress uses language with a settled meaning at common law [i.e., 'conspiracy'], Congress 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'" *Ibid.* (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)).[4]

Thus, under the common-law meaning rule applied in *Neder* and *Beck*, the absence of the term "reliance" does not end the inquiry as to whether reliance is an element of a civil RICO claim based on mail fraud. Indeed, the absence of the term "reliance" from RICO is hardly surprising given that this element would be relevant only to a small subset of civil RICO claims, *i.e.*, those predicated on fraudulent misrepresentations or concealments. Accordingly, the Court must look to the common-law elements of

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[4] See also *Pasquantino* v. *United States*, 544 U.S. 349, 359-60 (2005) (looking to common-law to construe wire fraud statute) (citing *Neder*, 527 U.S. at 22-23); *Field* v. *Mans*, 516 U.S. 59, 69 (1995) (When construing the phrase "false pretenses, a false representation, or actual fraud" in the Bankruptcy Code, 11 U.S.C. § 523(a)(3)(A), these "operative terms . . . carry the acquired meaning of terms of art. They are common-law terms, and . . . they imply elements that the common law has defined them to include."); *Holmes*, 503 U.S. at 268-69 (relying on the common-law concept of proximate causation to construe the phrase "by reason of" in § 1964(c)).

civil fraud at the time RICO was enacted in 1970 to determine whether a showing of reliance is required. See *Beck*, 529 U.S. at 501-04 (examining common-law elements of civil conspiracy at the time of RICO's enactment).

3. Such an analysis shows beyond cavil that reliance *is* required here. By 1970, the common-law elements of civil fraud—including reliance—had been settled for generations. Indeed, even before the turn of the last century, one of the "essential constituents" for a case of common law fraud was reliance.[5] Not only was inducement of the plaintiff to act (or to refrain from action) to his detriment "essential throughout the law of torts," but the common law also required that the plaintiff "must of course have relied upon it, and believed it to be true." William L. Prosser, LAW OF TORTS at 729 (3d ed. 1964).[6] As the

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[5] See *Brackett* v. *Griswold*, 112 N.Y. 454, 455 (1889) ("The essential constituents of [an action for fraud and deceit by means of false pretenses] are a false representation, known to be such, made or authorized or caused to be made by defendant, calculated and intended to influence the action of others, which came to the knowledge of plaintiff *and in reliance upon* which he, in good faith acted, and thus suffered the injury of which he complains. The absence of any one of these particulars is fatal to a recovery.") (emphasis added); *Foster* v. *Oberreich*, 230 Ill. 525, 527 (1907) (quoting *Brackett* and noting the requirement of reliance).

[6] See also William L. Prosser, LAW OF TORTS at 729 (3d ed. 1964) ("The false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course; and when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it for other reasons, his loss is not attributed to the defendant.") (footnotes omitted); *Danann Realty Corp.* v. *Harris*, 5 N.Y.2d 317, 322 (N.Y. 1959).

RESTATEMENT (FIRST) OF TORTS explained, the maker of a fraudulent misrepresentation would be liable only if the recipient relied on "the truth of the matter misrepresented" and the recipient's "reliance upon the misrepresentation [was] a substantial factor in determining the course of conduct which result[ed] in his loss." RESTATEMENT (FIRST) OF TORTS § 546 (1938).

When RICO was enacted, then, a jury was not left to devise its own definition of proximate cause in the context of common-law civil fraud. Rather, a jury was required to find that the plaintiff relied on the alleged fraudulent conduct and that the reliance itself was a proximate cause of the damages asserted. *Ibid.*

4. Thus, under "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses," *Neder*, 527 U.S. at 23, the Court cannot "infer from the absence of an express reference to [reliance] that Congress intended to drop that element from [a civil RICO claim predicated on] the fraud statutes," *ibid.* To the contrary, Congress' silence on this issue in the context of a civil RICO claim must be interpreted as "satisfaction with [the] widely accepted definitions" of common-law civil fraud. *Beck*, 529 U.S. at 501. And, because common-law civil "fraud" was defined to require reliance on the defendant's alleged misrepresentation or concealment, the Court must "presume [that Congress] . . . meant to adopt" the element of reliance into a civil RICO claim for damages based on mail fraud. *Id.* at 504.

B. To Satisfy The Requirement of Reliance, A Civil RICO Plaintiff Must Allege And Prove His Own Reliance, Not That Of A Third Party.

The "common-law meaning" rule also compels the conclusion that a RICO claim predicated on mail fraud requires a showing of reliance *by the plaintiff.* This too was and is a well established requirement of common law fraud. As the RESTATEMENT (FIRST) OF TORTS explains, common law fraud required a showing that the plaintiff itself, not just a third party, relied on the defendant's alleged misrepresentation in a business transaction:

> The maker of a fraudulent misrepresentation in a business transaction is liable for pecuniary loss caused to its recipient by *his [i.e., the plaintiff's]* reliance upon the truth of the matter misrepresented if *his [i.e., the plaintiff's]* justifiable reliance upon the misrepresentation is a substantial factor in determining the course of conduct which results in his loss.

RESTATEMENT (FIRST) OF TORTS § 546 (1938) (emphasis added). Other common law treatises from the time of RICO's enactment in 1970 similarly refute the notion that a plaintiff need only show third-party reliance to recover on a civil fraud claim. See, e.g., William L. Prosser, LAW OF TORTS at 729 (3d ed. 1964) ("The causal connection between the wrongful conduct and the resulting damage, essential throughout the law of torts, takes in cases of misrepresentation the form of inducement of *the plaintiff* to act, or to refrain from acting, to his detriment.") (emphasis

added).[7] Finally, a host of state court cases confirm that the common law of civil fraud requires the plaintiff to demonstrate his own reliance. See, e.g., *Edwards* v. *Chicago & N. W. Ry. Co.*, 223 N.E.2d 163, 166 (Ill. App. 1967) ("The essential elements of an action for fraud are that the defendant made representations that were false; that they were known by the defendant to be false and made with the intent to deceive the plaintiffs; and that *the plaintiffs, believing the representations, relied upon them* to their damage or injury.") (emphasis added).[8] And neither "the text

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[7] See also William L. Prosser, LAW OF TORTS at 729 (3d ed. 1964) ("The false representation must have played a material and substantial part in leading *the plaintiff* to adopt his particular course.") (emphasis added); RESTATEMENT (SECOND) OF TORTS § 546 (1977) ("The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered *by one who justifiably relies upon the truth of the matter misrepresented*, if his reliance is a substantial factor in determining the course of conduct that results in his loss.") (emphasis added).

[8] See also *Escoett & Co.* v. *Alexander & Alexander, Inc.*, 296 N.Y.S.2d 929, 929 (N.Y. App. Div. 1969) (dismissing a fraud claim because "[t]he representations of which the [claimant] complains were made to third parties and not to it, and those representations were relied upon by those third parties and not by it"); *Schock* v. *Jacka*, 460 P.2d 185, 188 (Ariz. 1969) (requiring reliance [on the fraud] by plaintiff to his damage"); *Piedmont Trust Bank* v. *Aetna Cas. & Sur. Co.*, 171 S.E.2d 264, 267 (Va. 1969) (holding that "one who seeks to hold another in fraud must clearly show that he relied upon the acts and statements of the other"); *First Credit Corp.* v. *Behrend*, 172 N.W.2d 668, 671-72 (Wisc. 1969) ("[I]n any fraud case, in order to secure relief, the complaining party must honestly confide in the representations or, as has been said, must reasonably believe them to be true."); *State Farm Mut. Auto. Ins. Co.* v. *Wall*, 222 A.2d 282, 286 (N.J. Super. 1966) (holding that plaintiff must show "reliance upon the truth of the representations . . .to warrant recovery of damages in an action for fraud and deceit").

[n]or structure" of the mail fraud or RICO statutes suggests a different rule in that context. *Neder*, 527 U.S. at 23 n.7.

Accordingly, under the common-law meaning rule, the Court must presume that Congress intended to incorporate into civil RICO claims predicated on mail fraud the common-law requirement that a plaintiff demonstrate its *own* reliance on the defendant's misrepresentation. See *Beck*, 529 U.S. at 504; *Neder*, 527 U.S. at 23. And that presumption is dispositive here.

C. Analogous Decisions From The Securities Fraud Context Support The Requirement of Reliance.

Analogous decisions interpreting the private right of action for securities fraud under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, have adopted the same approach. When interpreting Section 10(b), this Court has consistently looked to the common law of civil fraud and required a showing of reliance. See, e.g., *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231, 243 (1988) (discussing the "various . . . common-law requirements for a violation of § 10(b) or of Rule 10b-5" and noting that "reliance is an element of a Rule 10b-5 cause of action").[9] As the Court re-

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[9] See also *id.* at 253 (White, J., dissenting) ("In general, the case law developed in this Court with respect to § 10(b) and Rule 10b-5 has been based on doctrines with which we, as judges, are familiar: common-law doctrines of fraud and deceit."); *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 128 S. Ct. 761, 768 (2008) (listing "reliance upon the misrepresentation or omission" as an element of a private action for securities fraud); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 744 (1975) (examining the "common law" "tort of misrepresentation and deceit, to

cently explained in *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 128 S. Ct. 761 (2008), "[r]eliance by the plaintiff upon the defendant's deceptive acts . . . ensures that, for liability to arise, *the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability.*" *Id.* at 769 (emphasis added) (quoting *Basic*, 485 U.S. at 243). Adopting the same requirement in the context of civil RICO would make fraud claims under that body of case law consistent with—rather than substantially broader than—the federal securities laws.

II. Public Policy Dictates That Civil RICO Claims Predicated On Mail Fraud Satisfy The Element Of Reliance.

Multiple policy considerations and practical concerns also strongly favor the requirement that a plaintiff demonstrate its own reliance on the defendant's alleged misrepresentation.

A. Applying The Common-Law Element Of Reliance Prevents Plaintiffs From Transforming Ordinary State Tort And Contract Claims Into Federal RICO Claims.

First, adopting the plaintiffs' interpretation of the civil RICO statute would federalize a wide variety of ordinary state tort and contract claims. Indeed, in the absence of the traditional reliance requirement, many ordinary business claims—such as claims for

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which a claim under Rule 10b-5 certainly has some relationship").

unfair competition, tortious interference with contract, commercial disparagement, antitrust violations, products liability, misappropriation of trade secrets and breach of fiduciary duty, to name just a few—would merely duplicate a civil RICO claim based on mail fraud (only without the added benefit of treble damages and attorneys fees). See, e.g., *Summit Props. Inc.*, 214 F.3d at 562 (noting that rejection of a reliance requirement would allow RICO "to infiltrate garden variety products liability cases whenever marketing promotions touted the merits of the products"). And, unlike federal prosecutors, private litigants are not subject to "the restraining influence of prosecutorial discretion." *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 503 (1985) (Marshall, J., dissenting). "Quite to the contrary, such litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud." *Id.* at 504. Rejecting the common-law reliance requirement, then, would "stretch[] the mail and wire fraud statutes to their absolute limits and federalize[] important areas of civil litigation that until now were solely within the domain of the States." *Ibid.*

This is not a result the Court should reach lightly, for "[e]stablished canons of statutory interpretation counsel against . . . [inferring] a congressional intention to upset the federal-state balance in the provision of civil remedies." *Id.* at 507. In *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 473-74 (1977), for example, the Court held that a claim of fraud under Section 10(b) of the Securities and Exchange Act of 1934 required not just a showing of a breach of fi-

duciary duty, but conduct "fairly viewed as 'manipulative or deceptive' within the meaning of the statute." Of particular concern was the risk that the federal securities laws would displace existing state law. As the Court explained, "Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the [state] law of corporations that deals with transactions in securities." *Id.* at 479.

Similarly, in *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 128 S. Ct. 761 (2008), the Court refused to impose liability for securities fraud in the absence of reliance. In so holding, the Court noted that "[o]ur precedents counsel against th[e] extension" of the federal securities laws "in[to] areas already governed by functioning and effective state-law guarantees." *Id.* at 770-71.

The same concerns are even more present here. An expanded cause of action for civil fraud under RICO would trench upon not only the state law of corporations dealing with securities (as in *Santa Fe*), but also "garden-variety fraud and breach of contract cases," *Sedima*, 473 U.S. at 525 (Powell, J., dissenting), "garden variety products liability cases," *Summit Props. Inc.*, 214 F.3d at 562, and a host of other state-law causes of action. Here, for example, the plaintiffs have already asserted a state-law cause of action for tortious interference with prospective business advantage. 2005 U.S. Dist. LEXIS 34912 at *2. There is simply no need—let alone textual warrant—for inferring a congressional intent to cover the same ground as these causes of action.

B. A Reliance Element Helps Prevent Parties From Improperly Using The Civil RICO Statute As A Form Of Insurance Against Business Losses.

A reliance element would also prevent plaintiffs from using civil RICO claims as a form of insurance against business losses and subjecting legitimate businesses to unjustified and potentially crushing liability. It makes no sense to allow a lender who, for example, loans money to a risky borrower, with eyes wide open to potential fraudulent conduct, to use a civil RICO claim to recoup its losses—and treble damages to boot—when the lender never actually relied on any communications from the defendant. See *Bank of China, New York Branch* v. *NBM LLC*, 359 F.3d 171 (2d Cir. 2004). Recognizing a reliance element in the context of civil RICO claims predicated on mail fraud would prevent such an irresponsible plaintiff from recovering under the civil RICO statute. On the other hand, the plaintiffs' reading of the statute would provide an incentive for parties to engage in a risky transaction because, if the transaction went badly, the party always could resort to a civil RICO claim—with a potential treble damages recovery.

The plaintiffs' reading of RICO also blurs the settled distinction between civil and criminal RICO claims. See *Beck*, 529 U.S. at 501 n.6; *Summit Props. Inc.*, 214 F.3d at 559. There may be legitimate policy reasons for authorizing *criminal* RICO prosecutions under the mail fraud statute in the absence of a completed fraud—for example, broad liability might enable the government (exercising prosecutorial discretion) to reach organized criminal enterprises it oth-

erwise could not. But there are no similar policy reasons to allow private plaintiffs to recover treble damages in a *civil* RICO claim predicated on a mere failed attempt to defraud, *i.e.*, a claim that does not involve detrimental reliance on the material falsehood. Such damages represent a windfall to the plaintiff without serving the purposes RICO was designed to achieve.

In the analogous context of securities fraud, the Court has emphasized that civil fraud liability is not intended "to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Dura Pharms.*, 544 U.S. at 345; *see also Basic*, 485 U.S. at 252 (White, J., concurring) ("allowing recovery in the face of 'affirmative evidence of nonreliance' would effectively convert Rule 10b-5 into a scheme of investor's insurance") (citations omitted). The same policy considerations apply here. Parties should not be able to use the civil RICO statute as a form of insurance against ordinary business losses.

C. Recognizing The Common-Law Element Of Reliance Prevents RICO From Becoming A General-Purpose Private Attorney General Statute.

The common-law element of reliance is especially important in a case like this, in which the plaintiff is essentially bringing a private attorney general suit based on the alleged submission of false documents to a governmental body. Absent a requirement of reliance, virtually any party that believes it has been injured by mail or wire fraud directed at a governmental agency could bring a civil RICO claim based on that conduct. That possibility would transform RICO

into a general-purpose private attorney general or *qui tam*–type statute.

There is no evidence, however, that Congress intended RICO to be read so broadly as to authorize actions similar to, for example, those authorized under the False Claims Act. In contrast to RICO, the False Claims Act expressly provides that private individuals are permitted, under certain circumstances, to bring actions against persons who have made false or fraudulent claims for payment to the United States. *See* 31 U.S.C. §§ 3729-30. No provision of the civil RICO statute authorizes such a cause of action, nor should the Court read such a provision into RICO. Indeed, the Court has repeatedly emphasized its "reluctan[ce] to displace . . . well-entrenched federal remedial schemes absent clear direction from Congress." *Sedima*, 473 U.S. at 507 (Marshall, J., dissenting) (citing cases).

Requiring a plaintiff to demonstrate its own reliance upon the alleged fraud will thus prevent RICO from becoming a general-purpose private attorney general statute. Such a requirement will ensure that, where genuine injury has occurred, such claims for relief will be asserted by the injured governmental body—which "can be expected to vindicate the laws by pursuing [its] own claims." *Anza*, 126 S. Ct. at 1998.[10]

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[10] In this case, the Seventh Circuit concluded that Cook County was not the victim of the fraud, and thus would be unlikely to enforce its own rule, because "each winning bidder always pays all back taxes and interest" and "Cook County did not lose even a penny." 477 F.3d at 931. This, however, ignores the fact that the County's interest in the auction process is not merely finan-

D. Recognizing The Common-Law Element Of Reliance Discourages The Filing Of, And Facilitates The Dismissals Of, Frivolous And Extortive Civil RICO Claims.

Finally, requiring a showing of reliance in civil RICO suits predicated on mail fraud will help curb frivolous and extortive civil RICO suits. Such a requirement will "forc[e] courts to distinguish bona fide victims from plaintiffs who simply made poor judgments in transactions and should, therefore, suffer their own losses." Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 Harv. J.L. & Pub. Pol'y 855, 861 (2005).

The current state of RICO litigation demands such a distinction. Because of its attractive treble damages provision, the civil RICO statute has "achieved an unimagined level of use against legitimate individuals and businesses in the civil litigation context." Lee Applebaum, *Is There a Good Faith Claim for the RICO Enterprise Plaintiff?*, 27 Del. J. Corp. L. 519, 521 (2002). And, as Chief Justice

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cial (receiving back taxes) but also equitable (ensuring a fair distribution of tax liens)—otherwise there would be no reason for the Single, Simultaneous Bidder Rule. Moreover, as *Anza* and many other cases demonstrate, most cases involving fraud against a governmental entity will involve some form of financial loss by the government. See, e.g., *Anza*, 126 S. Ct. at 1998 (loss of state sales tax revenue); *United States* v. *Ali*, 493 F.3d 387, 390 (3d Cir. 2007) (loss of city revenues); *United States* v. *Spano*, 476 F.3d 476, 478 (7th Cir. 2007) ($10.6 million loss in scheme to defraud town); *United States* v. *Gardiner*, 463 F.3d 445 (6th Cir. 2006) (scheme to defraud city on construction contracts).

Rehnquist observed, "there is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys. Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorney's fees which civil RICO holds out." William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 10 (1989). Moreover, "[m]any a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit." *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting). RICO has thus been used against legitimate businesses for the very extortive purposes it was designed to combat. *Ibid.*; see also *Stoneridge*, 128 S. Ct. at 772 (noting the problem of allowing "plaintiffs with weak claims to extort settlements from innocent companies").

Civil RICO claims based on mail fraud are particularly subject to abuse given that "[t]he vast majority of civil RICO cases use mail, wire, or securities fraud as the predicate offense." Susan Getzendanner, *Judicial "Pruning" Of "Garden Variety Fraud" Civil Rico Cases Does Not Work: It's Time For Congress To Act*, 43 Vand. L. Rev. 673, 678 (1990). Indeed, Chief Justice Rehnquist went so far as to question "[w]hether it is a good idea to have a civil counterpart for wire fraud and mail fraud" at all, given that, "[w]ith the growth of long distance communication and technology, mail fraud and wire fraud—which applies to all telephone calls—have a much wider sweep now than they did when the statutes were enacted." Rehnquist, 21 St. Mary's L.J. at 10.

These policy concerns militate strongly in favor of recognizing a plaintiff's own reliance as an element of

civil RICO claims based on mail fraud. For one thing, a reliance requirement will reduce the number of plaintiffs who can assert RICO claims consistent with good-faith pleading requirements. Moreover, if a plaintiff files a civil RICO claim based on mail fraud without having actually relied upon a fraudulent misrepresentation or concealment, the reliance requirement puts the court in a better position to dismiss, or grant summary judgment on, that claim once it becomes apparent that no reliance actually occurred.[11] This, in turn, reduces undue pressure on innocent defendants to settle weak claims.

A reliance requirement is thus doubly beneficial: it not only reduces the number of meritless civil RICO claims draining judicial resources, it also prevents RICO from "be[ing] used for extortive purposes [and] giving rise to the very evils that it was designed

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[11] Compare *Central Distribs. of Beer, Inc.* v. *Conn.*, 5 F.3d 181, 184 (6th Cir. 1993) (affirming summary judgment in favor of the defendant, in part, because the plaintiff had not "produced a shred of evidence" that the plaintiff "relied on any statement or omission to its detriment"); *Fla. Evergreen Foliage* v. *E.I. DuPont De Nemours & Co.*, 336 F. Supp. 2d 1239, 1279 (S.D. Fla. 2004) ("Summary judgment is also entered in DuPont's favor on Plaintiff-Growers' RICO claims, Counts VI and VII. The undisputed record shows that Plaintiff-Growers cannot prove reasonable reliance or direct injury."); *Lifschultz Fast Freight, Inc.* v. *Consol. Freightways Corp.*, 805 F. Supp. 1277, 1292 (D.S.C. 1992) (granting summary judgment in favor of the defendant because the plaintiff "presented no evidence" of detrimental reliance); with *Feely* v. *Whitman Corp.*, 65 F. Supp. 2d 164, 174 (S.D.N.Y. 1999) (denying summary judgment to the defendants because "the common law requirement of justifiable reliance is not an element of wire or mail fraud under federal law").

to combat." *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting).

* * * * *

In sum, both the "common-law meaning" rule and sound policy reasons compel the conclusion that a plaintiff's own reliance on a defendant's misrepresentation is a required element of a civil RICO claim predicated on mail fraud. The Court of Appeals erred in adopting the plaintiffs' contrary arguments and thereby construing the civil RICO statute well beyond its intended breadth.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The

Supreme Court Of The United States

JOHN BRIDGE, et al.,
Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATES OF CONNECTICUT, ARIZONA, ILLINOIS, MONTANA, NEW MEXICO, OHIO, OKLAHOMA, TENNESSEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the plaintiff.

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INTEREST OF *AMICI CURIAE*

We represent the people of our respective states. Our responsibilities to them include enforcement of our states' laws as well as, where appropriate, federal law, including the Racketeer Influenced and Corrupt Organizations Act.

The question of whether or not to engraft a reliance element onto the mail fraud predicate act under civil RICO raises a significant public policy issue for us. Civil RICO provides many of our offices with an important law enforcement tool. It allows access to federal court when a federal claim is presented or when a federal forum is desirable in a particular case. And, along with its state counterparts, federal RICO furnishes a potent means for deterring criminal commercial behavior. We believe that an unduly narrow reading of civil RICO would blunt a vital law enforcement instrument.

We also believe that private suits under civil RICO, such as the one before the Court, further congressional intent and promote our law enforcement goals. Resource constraints and enforcement priorities may prevent state and local governments from pursuing meritorious claims, specifically including claims in which commercial actors deceive governmental entities. Private litigants seeking to recover genuine losses under civil RICO help fill the "prosecutorial gap." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 493 (1985). We submit that Congress intended

RICO to allow appropriate private litigation like this case, and we strongly favor its continuation beyond the motion to dismiss stage.

STATEMENT OF THE CASE

We adopt the Respondents' Statement of the Case. *See* Brief for Respondents at 3-12.

SUMMARY OF ARGUMENT

The text and history of the controlling statutory provisions do not support adding a "reliance" element. Neither statute mentions reliance. Nor has the Court construed "by reason of" to require "reliance" as an element of an antitrust claim. But the Court has upheld Sherman Act claims alleging that persons other than the plaintiff – including governmental entities – relied on false or fraudulent statements by the defendant.

The Petitioners' position also would have the perverse effect of varying what "by reason of" means according to the particular predicate offense at issue. Many instances of "racketeering activity" do not involve any kind of fraud or only a subspecies of it. And the Court has explicitly stated that the mail fraud statute does not require reliance. A "conjunction" of section 1964(c) with the predicate offense statutes thus does not supply the missing "reliance" element.

Policy considerations weigh heavily against an unduly restrictive reading of RICO. Congress intended a broad scope for civil RICO claims under

section 1964(c). Fulfilling the congressional purpose here will help fill "prosecutorial gaps" in the ability of state and local governments to discover and penalize frauds affecting their operations.

Finally, private litigation under civil RICO does not offend us. We have seen no proof that such lawsuits have unduly burdened courts or litigants. Nor do we believe that the possibility of aggregating private claims bears on the issues before the Court or that aggregation of similar claims is undesirable. The Court's decisions in *Illinois Brick* and *Stoneridge* do not support Petitioners' position and, in our view, tend to do the opposite.

ARGUMENT

I. THE INJURY "BY REASON OF" LANGUAGE IN SECTION 1964(c) MEANS INJURY BECAUSE OF THE PREDICATE ACT – NOT BECAUSE OF *RELIANCE* ON THE PREDICATE ACT

As we read their complaint, Respondents lost chances to buy tax liens at Cook County auctions because Petitioners cheated. Petitioners' cheating – what Blackstone called an "Offense Against Public Trade"[1] – consisted of lying about their independence from one another. They in fact ganged up to deprive Respondents of seats at the lien auctions and then to split the profits from

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[1] W. Blackstone, *Commentaries on the Laws of England*, book 4, chapter 12.

acquiring extra liens. Petitioners' zero-sum game resulted, as they intended, in wins for them and losses for Respondents.

Section 1964(c) of RICO authorizes civil remedies for injuries that occur "by reason of" serious criminal conduct. The complaint alleges that Petitioners used the mails to facilitate their cheating and so committed a predicate offense under the mail fraud statute. They now deny liability on the ground that Respondents' losses did not result from their reliance on Petitioners' misrepresentations.

But in this Court Petitioners do not contest Respondents' allegation that Petitioners proximately caused Respondents actual injury in their business and property. Petitioners argue instead that the Court – having deemed "by reason of" to incorporate the common law element of "proximate cause" in *Holmes*[2] and *Anza*[3] – ought now to augment those words to mean "by reason of *reliance*" by the plaintiff on the underlying mail fraud.

The "by reason of" phrase itself – which of course says nothing about reliance – will not bear Petitioners' interpretation. As the Court recognized in *Holmes*, the language "can . . . be read to mean that a plaintiff is injured 'by reason of' a RICO violation, and therefore may recover, simply on showing that the defendant violated §

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[2] *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

[3] *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006).

1962, that plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury." *Holmes*, 503 U.S. at 265-66 (footnote omitted). But the literal construction "is hardly compelled", and it would ignore the "meaning that courts had already given" the same formulation in decades of antitrust decisions. *Id.* at 266 & 268. "Proximate cause is thus required." *Id.* at 268.

No such interpretive history supports adding "reliance by the plaintiff" after "by reason of". Victims of monopolization, boycotting, or price-fixing do not have to show that they suffered injury "by reason of" their reliance on anticompetitive conduct. Many antitrust cases on the contrary arise from openly coercive and predatory behavior – the very opposite of deception. *E.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (involving overt influence on private association whose standards gave defendant competitive advantage). And this Court has expressly recognized that the acquisition of monopoly power through fraud on a governmental entity – but not on the plaintiff – provides a basis for recovery of treble damages under the Sherman Act. *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 176 (1965) (authorizing "recovery of treble damages for fraudulent procurement of the patent [from the U.S. Patent and Trademark Office] coupled with violations of § 2").[4] Reliance by the plaintiff is thus

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[4] *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) ("In *Walker Process* . . . , we found that enforcement of a fraudulently obtained patent claim could violate the

a concept alien to the historical meaning of "by reason of".

Nor would engrafting a reliance element onto section 1964(c) make sense with respect to most instances of possible "racketeering activity". Section 1961(1) defines "racketeering activity" to include about 100 indictable offenses, many of which do not involve fraud – things like "sports bribery", "transmission of gambling information", "obscene matter", "murder-for-hire", "infringement of a copyright", "trafficking in contraband cigarettes", and "chemical weapons". 18 U.S.C. § 1961(1). Does "by reason of" shift meaning according to the peculiar common law roots of each different underlying offense – *assumpsit*, deceit, and the like?[5] Does the phrase add an element to the "proximate cause" inquiry for "forgery or false use of passport" in section 1961(1) but not for mere "misuse of passport"? Or does it instead simply signify, as the Court held in *Holmes* and *Anza*, a proximate cause requirement?

But even if section 1964(c) shifts meaning depending on the predicate offense, the path that Petitioners invite the Court to embark upon – "to

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Sherman Act."). The Court has also upheld liability where the deceptive statements emanated from the defendant's agents and misled the plaintiff's customers rather than the plaintiff. *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982) (affirming judgment against standard-setting organization for making statement that "in effect declared Hydrolevel's product unsafe" and caused plaintiff to lose sales to competitor).

[5] *See* W. Blackstone, *Commentaries on the Laws of England*, book 4, chapter 9 (discussing "Injuries to Personal Property").

interpret § 1341 in conjunction with § 1964(c)" – simply does not lead to the conclusion they wish. For nothing in section 1341, either, so much as hints at a reliance element. Yes, the Court in *Neder v. United States*, 527 U.S. 1 (1999), read "scheme or artifice to defraud" in section 1341 to require materiality, but in the same case the Court construed the same language *not* to require reliance, *id.* at 25 ("The common-law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in the federal fraud statutes."). The "conjunction" of one statute – which does not incorporate a reliance element – with another one – which likewise does not incorporate it – cannot generate the absent element. Petitioners do not venture to explain where in the statutory text one finds the reliance element. One must conclude that they cannot.

II. THE NATURAL READING OF SECTION 1964(c) WILL ENHANCE WISE LAW ENFORCEMENT

To us, the dispute between Petitioners and Respondents presents a question of enforcing an important federal statute and, by analogy, its state law offspring. We submit that interpreting RICO not to incorporate a reliance element will promote sound law enforcement without penalizing legitimate business practices.

A. An Unduly Restrictive Construction of Section 1964(c) Would Thwart Congressional Intent and Hinder State Law Enforcement

The Court has noted that "narrow readings" of section 1964(c) ignore the intent of Congress to enact "an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima*, 473 U.S. at 498. RICO thus "is to be read broadly" and "is to be 'liberally construed to effectuate its remedial purposes,' Pub. L. 91-452, § 904(a), 84 Stat. 947." *Id.* at 497 & 498. "The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Id.* at 498. "Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." *Id.* at 491 n.10. Curtailing the reach of section 1964(c) by engrafting a "reliance" element on it in 2008 would defeat the mandate of Congress in 1970 just as surely as adding a "racketeering injury" element or a "prior-conviction requirement" to it would have in 1985. *Id.* at 495 & 488 (rejecting both).

As this case demonstrates, state and local governments will not discover and correct all frauds. Indeed, "[p]rivate attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps." *Id.* at 493. True, as Chief Judge Easterbrook noted, "governments always have *some ability* to detect and penalize frauds." Pet. App. at 7a (emphasis added). And, in an ideal world of limitless resources, state and local

governments could "detect and penalize" all of the various "frauds" that may game their normal functions. State and local governments have the legal means and resources to take enforcement action and punish only a fraction of those they do discover. States are not offended when private litigants pursue available remedies.

We respectfully differ with the argument that prosecutorial discretion does not inform our decisions about whether to pursue civil RICO claims. *See* Brief for Petitioners at 37-38; Brief for the Chamber of Commerce at 22. Although the argument may aim at private lawyers, it hits us, too. Trying to cabin civil RICO (unduly, we believe) in hopes of discouraging expensive strike suits would at the same time deprive many states of a tool that we use judiciously in the service of our citizens within the parameters intended by Congress.

B. Other Arguments Do Not Justify Adding a "Reliance" Element

We respectfully disagree with suggestions that declining to impose an extra-statutory condition on RICO claims sounding in fraud would open litigation floodgates. *See* Brief of Washington Legal Foundation at 18 (claiming an "ever-increasing number of civil RICO suits filed each year"). Since 2000, private RICO cases in federal court have averaged 753 annually (and totaled 703 in the year that ended March 31, 2007) – representing less than 0.3 percent of the more than 250,000 average federal filings each year during

that period.[6] Of these, no more than a handful may relate to rigging of auctions or the making of misrepresentations to third parties. In 97 pages of briefs, Petitioners and their supporting *amici* have identified none.

The notion that the Court should bend its statutory construction to create a "reliance" barrier to class actions deserves comment as well. Brief for McKesson Corp. at 29-33. In the first place, this case does not involve class allegations; and we question the appropriateness of bringing class certification issues into the discussion of the questions on which the Court granted review. Second, the point that "class actions that are certified almost always settle", if true, hardly distinguishes class actions from all other civil cases, which likewise "almost always settle"; nor does it say anything about whether the defendants in those cases overpaid, after rationally taking into account the cost of litigating and the probability of losing on the merits. Third, we believe that aggregate litigation, including class actions, more often than not serves the salutary purpose of leveling the parties' respective bargaining positions; absent aggregation, an individual who has lost $5 or even $500 as a proximate result of a company's RICO violation enjoys a purely theoretical right to a civil remedy. We therefore do not see the possibility of thwarting aggregation as a legitimate reason to narrow RICO.

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[6] Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics* (2001-2007) (available at http://www.uscourts.gov/caseloadstatistics.html).

The concept that the antitrust case of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), provides any help here strikes us as inapposite. *See* Brief of Washington Legal Foundation at 13-15. The Court in *Illinois Brick*, for policy and administrative reasons, limited standing to the first victims of price fixing – the ones who purchased directly from a member of the price fixing conspiracy regardless of whether they passed on the overcharge to their customers. This case of course does not involve price fixing. Nor does it concern any question of whether Cook County, the entity that relied on Petitioners' misrepresentations, suffered pecuniary loss; it manifestly did not. And it therefore, unlike the direct purchasers in *Illinois Brick*, could not possibly have passed its (non-existent) losses on to Respondents, a circumstance that might conceivably raise a question about allocation of damages.

Finally, the suggestive citations to *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008), actually underscore the fundamental difference between this case and securities fraud litigation. No one doubted that section 10(b) of the Securities Exchange Act and the Securities and Exchange Commission's Rule 10b-5 required proof of reliance on something fraudulent. The reliance element existed from the moment the cause of action sprang from the Court's brow. *See id.* at 776. In this case, Congress enacted section 1964(c) and defined mail fraud as an instance of "racketeering activity" with knowledge of the distinctive requirements of securities fraud claims and yet chose language that

made "proximate cause" *simpliciter* the test of causation. That, we submit, should end the matter.

CONCLUSION

The Seventh Circuit's sound decision – to permit Respondents the opportunity to prove their allegations that Petitioners' zero-sum gaming of the auction process proximately injured them – should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

12

No. 07-210

In The
Supreme Court of the United States

JOHN BRIDGE, et al.,

Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE*, INTERNATIONAL ASSOCIATION OF INSURANCE RECEIVERS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF INSURANCE RECEIVERS

The International Association of Insurance Receivers ("IAIR") is an international organization of insurance liquidators and professionals who practice in the field of insurance regulation and liquidation.[1] Members of IAIR routinely serve as the statutory and court-appointed receivers of insolvent insurance companies. Some of the companies for which the members serve as receivers have failed because persons in control illegally diverted policyholder premium dollars for their own personal use. These frauds impair the insurance companies' ability to meet their obligations to policyholders and creditors.

IAIR has no private, personal or economic stake in the review of the question presented to the Court. In its members' capacities as fiduciaries for the estates of insolvent insurers, however, it has a direct interest in the preservation of the use of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, as a vehicle for the recovery of damages caused by fraud that victimizes insurance companies. Many insurance company receivers bring civil RICO actions against persons or entities whose criminal acts

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk.

targeted the insurance company. These actions have aimed to recover diverted assets, as well as consequential damages. Amounts recovered have been added to the estates of the victimized insurers and eventually distributed to the insurers' policyholders and creditors.

Where an insurance company's failure is the result of fraud or other deceit, IAIR members believe the perpetrators should be punished and, if possible, the victims – including the insurance company itself and its policyholders – compensated by the wrongdoers. The members have found RICO to be an extraordinarily powerful weapon for vindicating their states' insurance regulatory goals by recovering damages for the benefit of the policyholders and creditors of insolvent insurers, and for punishing those whose illegal activities victimize insurance companies that are powerless to protect themselves from misconduct. Although in certain respects RICO parallels substantive state statutory or common law violations and remedies, RICO's provision for nationwide service of process has ensured the ability of receivers to sue multiple wrongdoers in a single federal forum, a convenience that the states are powerless to provide.

IAIR believes that the Seventh Circuit's holding is correct that a direct victim of fraud may recover in a civil action under RICO regardless of whether it was the direct recipient of false statements. In the kinds of schemes to defraud insurance companies that IAIR members seek to redress, the insurance companies are directly victimized although the perpetrators often make their false and misleading statements to

insurance regulators, rather than to the companies themselves. To this end, IAIR supports the position of Respondents in urging the Court to affirm the Seventh Circuit's holding.

SUMMARY OF ARGUMENT

By their terms, neither RICO, nor the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, impose a requirement that a plaintiff in a civil RICO action predicated on violations of the mail or wire fraud statute prove that it relied directly on misrepresentations by the defendant. Although common law principles may be read into statutes, those principles may not be engrafted when the statute "otherwise dictates." *Neder v. United States,* 527 U.S. 1, 23 (1999) (internal quotation marks and citations omitted). A requirement of reliance by the plaintiff is inconsistent with RICO's proximate cause requirement, the language of Section 1964(c), and the mail and wire fraud statutes themselves.

Section 1964(c) provides that "any person injured by reason of" a violation of Section 1962 may bring a civil action. In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court held that Section 1964(c)'s "by reason of" language requires a showing of proximate cause. *Id.* at 268. But at the same time, the Court eschewed "a blackletter rule" in favor of a flexible, fact-specific inquiry based on three specific policy criteria. *Id.* at 269-70, 273 n.20. Petitioners' reliance-by-plaintiff requirement is the kind of blackletter rule the *Holmes* Court refused to adopt. Moreover, Section 1964(c) provides a cause of action to "any" person injured by a violation of Section

1962. Under Petitioners' theory, a person directly injured within the meaning of *Holmes* by a RICO violation could not recover if it had not also directly relied on a defendant's misrepresentation. Petitioners' theory is further inconsistent with Section 1964(c) because it would give a different meaning to the language of Section 1964(c) when the Section 1962 violation alleged involved predicate acts of mail or wire fraud, as opposed to other predicate acts – such as murder or kidnaping – that clearly require no showing of reliance.

This Court has already found that a reliance-by-plaintiff requirement "plainly [has] no place" in the mail and wire fraud statutes. *Neder*, 527 U.S. at 24-25. Such a requirement is inconsistent with those statutes not only because criminal liability can attach for uncompleted frauds, but because criminal liability can attach under the mail and wire fraud statutes for completed frauds that do not include the victim's direct reliance on a defendant's misrepresentations. *See, e.g., Carpenter v. United States,* 484 U.S. 19 (1987); *Schmuck v. United States*, 489 U.S. 705 (1989). Once again, Petitioners' reliance-by-plaintiff requirement would result in different requirements for the mail and wire fraud statutes in criminal and civil cases. Such an outcome is not supported by the language of the mail or wire fraud statutes or RICO.

Petitioners and their *amici* have not advanced any compelling reason to impose a reliance-by-plaintiff requirement in the limited circumstance of a RICO civil action based on predicate acts of mail and wire fraud. In fact, the concerns raised by Petitioners – that it is necessary to show a direct relation between

a plaintiff's injury and the defendant's conduct – are adequately addressed by the *Holmes* three part analysis. Here, Respondents' injury meets every part of the *Holmes* test: (1) there were no other factors other than Petitioners' fraud affecting the auction process or leading to Respondents' loss of tax liens; (2) Respondents and others like them who were awarded fewer tax liens were the only parties injured as a result of Petitioners' fraud, so there is no risk of multiple recoveries; and (3) there is no other party with a financial incentive to bring a civil action against Respondents, so the most directly injured victims would in fact be the persons vindicating the law.

A reliance-by-plaintiff requirement is not only unnecessary given the existing *Holmes* test, it would serve to prevent a host of actual victims of fraudulent schemes from recovering under RICO for their injuries. This is especially true in circumstances like those involving the misappropriation of assets from insurance companies, where a state insurance regulator acts as a gatekeeper to protect those assets so they will be available to pay policyholders' claims when they come due. Millions have been stolen from insurance companies by unscrupulous owners who make misrepresentations to regulators to perpetrate their schemes. The court-appointed receivers, who stand in the shoes of the victimized companies, should have a cause of action available under RICO, along with its procedural conveniences and substantive might, to recover those millions.

ARGUMENT

I. THE RELEVANT STATUTES PRECLUDE A PLAINTIFF-RELIANCE REQUIREMENT.

As with any issue of statutory construction, the analysis of whether RICO requires a plaintiff in a civil RICO action to prove that it relied on direct misrepresentations by the defendant begins with the language of the statute itself. *See Neder v. United States*, 527 U.S. 1, 20 (1999) ("we first look to the text of the statutes at issue to discern whether they require a showing"). The operative statutory provisions here are the mail fraud statute, 18 U.S.C. § 1341, and the civil action provision of RICO, 18 U.S.C. § 1964(c).[2] As Petitioners concede, neither of those provisions includes the word "reliance" (Pet. Br. at 19), and there is no basis or reason to read a requirement of plaintiff-reliance into them. *See Anza v. Ideal Steel Supply*

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[2] Section 1964(c) provides that "any person injured in his business or property by reason of a violation of Section 1962" may bring a civil action. Respondents alleged below that they were injured because Petitioners violated Section 1962(c) of RICO by participating in the conduct of an enterprise's affairs through a pattern of racketeering activity, in the form of multiple violations of the mail fraud statute, 18 U.S.C. § 1341. *See* 18 U.S.C. § 1961 (defining "racketeering activity" to include "any act indictable" under title 18 section 1341). As this Court has previously held, "[a]ny recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497 (1985). Thus, Respondents must prove that they were injured in their business or property by Petitioners' violations of the mail fraud statute.

Corp., 547 U.S. 451, 476-78 (2006) (Thomas, J., dissenting) (no plaintiff-reliance requirement in civil RICO claims based on mail or wire fraud predicate acts).

Petitioners argue that the plaintiff-reliance element must be read into the mail and wire fraud statutes and RICO Section 1964(c) because this Court requires those statutes to be interpreted by incorporating principles of common law fraud. *See* Pet. Br. at 19-20 (*citing Neder*, 527 U.S. at 20 and *Beck v. Prupis*, 529 U.S. 494 (2000)). But in *Neder*, the Court stated "we must presume that Congress intended to incorporate [common law requirements] unless the statute otherwise dictates." 527 U.S. at 23 (emphasis, internal quotation marks and citation omitted).[3] A reliance-by-plaintiff requirement would be inconsistent with RICO's proximate cause requirement, the language of Section 1964(c), and the mail fraud statute. Thus, because those statutes "otherwise dictate," a reliance-by-plaintiff requirement cannot be engrafted onto them.

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[3] In *Beck*, the Court interpreted the word "conspiracy" in Section 1962(d) to incorporate common law principles of civil conspiracy for a civil RICO conspiracy action. 529 U.S. at 500-501. But the principles of civil conspiracy were not otherwise inconsistent with Section 1962(d) or Section 1964(c) and, thus, the *Neder* standard for incorporation of those principles had been met.

A. RICO Precludes a Plaintiff-Reliance Requirement.

1. A Plaintiff-Reliance Requirement Cannot Be Read Into the "By Reason Of" Language of Section 1964(c).

Petitioners and their *amici* claim that the language in Section 1964(c) requiring plaintiff to show injury "by reason of" a RICO violation, or the intersection of that provision with the mail fraud statute, compels imposition of a plaintiff-reliance requirement. *See* Pet. Br. at 18-19. But *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), which established that Section 1964(c)'s language requires a flexible, fact-specific proximate cause inquiry, forecloses that possibility, and the broad language of Section 1964(c) only reinforces that conclusion.

a. A Plaintiff-Reliance Requirement Would Violate the Flexible, Fact-Specific *Holmes* Test.

In *Holmes*, the Court found that Section 1964(c)'s requirement that RICO plaintiffs suffer injury "by reason of" defendant's RICO violation requires a showing of proximate cause. 503 U.S. at 268. The Court explained that proximate cause refers to a set of "judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" *Id.* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER AND KEETON ON LAW OF TORTS § 41, p. 264 (5th ed. 1984)).

The Court emphasized that proximate cause imposes a "demand for some direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Holmes*, 503 U.S. at 268-69. The Court explained the three chief policy reasons behind the "directness" requirement:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other factors. Second, quite apart from the problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

Id. at 269-70 (internal citations omitted).

Proximate cause, then, is not a simple, yes-or-no inquiry; it is a flexible, fact-specific inquiry made in light of the policy concerns just quoted. As the Court

made clear in *Holmes*, "'the infinite variety of claims that may arise make it virtually impossible to announce a blackletter rule that will dictate the result in every case.'" *Id.* at 273 n.20 (quoting *Assoc. Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983)). "Thus," the Court continued, "our use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text" (*i.e.*, the three concerns quoted above). *Holmes*, 503 U.S. at 273 n.20. Consistent with that statement, the Court analyzed the "directness" of the *Holmes* plaintiff's injury by reference to each of these policy concerns, and found that it failed to show proximate cause. *Id.* at 276. *Anza* performed the same analysis (and reached the same result). *Anza*, 547 U.S. at 457-58.

The strict reliance-by-plaintiff requirement Petitioners would have govern all civil RICO actions with mail or wire fraud predicates is exactly the type of "blackletter rule" the Court rejected in *Holmes*. In place of the detailed, fact-specific analysis of proximate cause encompassing the three policy concerns identified in *Holmes*, Petitioners would substitute a blinkered, one-dimensional test – whether the plaintiff personally relied on the false or misleading statements. Petitioners' approach is at odds with the proximate cause test this Court announced in *Holmes* and reaffirmed in *Anza*.

That does not mean, of course, that the question of whether plaintiff itself relied on defendant's misrepresentations is irrelevant to the *Holmes* proximate cause analysis. If such reliance occurred, it

would typically be Exhibit A in showing the "direct" link between defendant's conduct and plaintiff's harm that *Holmes* requires. But as Justice Thomas explained in his *Anza* dissent, "the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action." *Anza*, 547 U.S. at 478 (Thomas, J. disssenting).[4]

b. A Plaintiff-Reliance Requirement Would Conflict with the Broad Language of Section 1964(c).

Petitioners and their *amici* argue that RICO's proximate cause requirement necessitates reliance by the plaintiff when mail or wire fraud predicates are involved because such reliance is central to proving causation in the common law fraud context. *See, e.g.*, Pet. Br. at 25-29; McKesson Corp. Br. at 10-20. But the text of § 1964(c) that requires proximate cause precludes imposition of any common law reliance-by-plaintiff requirement. It allows a civil claim by "*any person* injured in his business or property by reason of

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[4] *See also* Michael Goldsmith & Evan S. Tilton, *Proximate Cause in Civil Racketeering Cases: The Misplaced Role of Victim Reliance*, 59 Wash. & Lee L. Rev. 83, 126 (2002) ("The victim reliance controversy stems from judges asking whether plaintiffs can prove they relied on fraudulent misrepresentations *rather than asking whether plaintiffs can demonstrate proximate cause*. Those courts that measure proximate cause exclusively by looking to victim reliance fail to appreciate that victim reliance is sufficient – *but not always necessary* – to show proximate cause.") (emphasis in original).

a violation of section 1962." 18 U.S.C. § 1964(c) (emphasis added). According to the Court, "read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzalez*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New Int'l Dictionary 97 (1976)). As the Seventh Circuit found (*see* Pet. App. at 5a-6a), and Respondents properly allege, they were directly injured in their business or property "by reason of" Petitioners' alleged conduct as *Holmes* defines that phrase, even though Petitioners' misrepresentations were made to a third party. As a result, imposing a reliance-by-plaintiff requirement would deprive some "persons" who were injured "by reason of" a scheme to defraud – such as Respondents, or an insurance company directly injured by misrepresentations made to state regulators – of a cause of action under Section 1964(c) and accordingly violate that provision.[5] In other words, by providing a cause of action to "any person" injured "by reason of" a scheme to defraud, and not restricting claims to persons who actually relied on fraudulent statements, the plain language of Section 1964(c) precludes imposition of a plaintiff-reliance requirement.

The "any person" language in Section 1964(c) is similarly fatal to Petitioner's argument that *Neder*

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[5] The United States made this argument in a case involving virtually the same question presented here. *See* Brief for the United States as *Amicus Curiae* Supporting Respondents, *Bank of China v. NBM L.L.C.*, 546 U.S. 1026 (2005), (No. 03-1559), *available at* 2005 U.S. S. Ct. Briefs LEXIS 780, at **35 (arguing that third-party reliance "is a viable avenue of causation" in civil RICO claims based on mail or wire fraud predicate acts).

requires importation of the supposed common law reliance-by-plaintiff requirement. By providing that "any person" injured "by reason of" a RICO violation may bring suit, and not limiting claims to those who can show personal reliance, Section 1964(c) "otherwise dictates" against the imposition of any common law reliance-by-plaintiff requirement. *See Neder*, 527 U.S. at 23.

2. RICO Does Not Otherwise Permit Imposing a Plaintiff-Reliance Requirement.

As just shown, imposing a plaintiff-reliance requirement is not compelled by, and would actually conflict with, the proximate cause requirement of Section 1964(c). No other portion of RICO supports a plaintiff-reliance requirement either. Petitioners do not, and cannot, point to any language in RICO that expressly imposes such a requirement. Nor can one be read into or inferred from RICO's text, including the "by reason of" language in Section 1964(c), and neither Petitioners nor their *amici* identify any case that suggests otherwise.

The reason for that is straightforward. Unlike proximate cause, "[r]eliance is not a general limitation on civil recovery in tort; it 'is a specialized condition that happens to have grown up in common law fraud.'" *Anza*, 547 U.S. at 477 (Thomas, J.,dissenting) (quoting *Sys. Mgmt., Inc. v. Loiselle*, 303 F.3d 100, 104 (1st Cir.

2002)).[6] As a result, a reliance-by-plaintiff requirement cannot be inherent in the RICO "by reason of" provision because it could not, as a legal or logical matter, apply to all civil RICO actions. The long list of RICO predicate acts in 18 U.S.C. § 1961(1) makes this clear. It includes murder, kidnaping, arson, robbery, "dealing in a controlled substance" and other acts that could not conceivably require or involve any element of "reliance." *See* 18 U.S.C. § 1961(1).

Moreover, no part of Section 1964(c) suggests that plaintiffs must prove additional elements, beyond those of the predicate acts themselves, in RICO claims based on some predicate acts (*e.g.*, mail and wire fraud) but not others. As Justice Thomas explained in his *Anza* dissent, "there is no language in § 1964(c) (2000 ed.) that could fairly be read to add a reliance requirement in fraud cases only." 547 U.S. at 477. Indeed, if the Court were to impose a reliance-by-

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[6] As Justice Thomas explained, and as *Holmes* itself makes clear, the Court found the "by reason of" language to require proximate cause because: a) Congress could not have rationally "meant to allow all factually injured plaintiffs to recover," largely because proximate cause is "not only a general condition of civil liability at common law but is almost essential to shape and delimit a rational remedy," *Anza*, 547 U.S. at 477 (Thomas, J. dissenting) (internal quotation marks and citations omitted); and b) RICO's "by reason of language" is identical to that in Section 7 of the Sherman Act, which, at the time Congress enacted RICO, had been held to require proximate cause in civil actions under that statute. *Id. See also Holmes*, 503 U.S. at 266, 268. As Justice Thomas correctly recognized, neither of those considerations is present with respect to the issue of reliance. *Anza*, 547 U.S. at 477-78.

plaintiff requirement in Section 1964(c) claims based on mail and wire fraud predicates, and not in Section 1964(c) claims based on other predicates, it would be "'giv[ing] these same words a different meaning for each category,'" thereby "'invent[ing] a statute rather than interpret[ing] one.'" *Pasquantino v. United States*, 544 U.S. 349, 358-59 (2005) (*quoting Bogan v. United States*, 522 U.S. 398, 406 (1998)).

Finally, declining to impose an additional, unwritten requirement on a subset of Section 1964(c) claims, the approach Justice Thomas took in *Anza*, is consistent with the principle that "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to be 'liberally construed to effectuate its remedial purposes,' Pub. L. 91-542, § 904(a), 84 Stat. 947." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985) (internal citation omitted). Neither Petitioners nor their *amici* mention this fundamental precept of RICO law. Consistent with that precept, and with Justice Thomas' *Anza* dissent, the Court should decline Petitioners' request to read requirements into Section 1964(c) that do not appear in its text.

B. The Mail and Wire Fraud Statutes Do Not Impose A Plaintiff-Reliance Requirement.

In *Neder*, the Court made clear that "the common-law requirement[] of 'justifiable reliance' . . . plainly [has] no place in the federal fraud statutes." 527 U.S.

at 24-25.[7] Despite that unequivocal pronouncement, Petitioners and their *amici* argue that the Court must read a common law reliance-by-plaintiff requirement into the mail and wire fraud statutes when they are being used as predicate acts in a civil action.[8]

Neither Petitioners nor their *amici* cite any authority suggesting that an element that has "no place" in a federal statute may nonetheless be read into that statute when it is being used as a predicate act in a civil RICO case. Congress chose statutory mail and wire fraud, and not common law fraud, as predicate acts for RICO liability – both criminal and civil. There is no basis in the RICO statutory framework to support adding additional requirements to the mail fraud statute when it is being used in the civil, rather than the criminal, context. *See Pasquantino*, 544 U.S. at 358-59 (improper to give same words in statute different meaning in two different contexts).

In any event, the case Petitioners and their *amici* make for imposing a plaintiff-reliance argument rests on a faulty premise: that the only reason mail and

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[7] *Neder* involved interpretation of the federal mail fraud, wire fraud (18 U.S.C. § 1343) and bank fraud (18 U.S.C. § 1344) statutes. This Court has held that to the extent the mail and wire fraud statutes share the same language, it applies the same analysis to offenses under both statutes. *See Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

[8] As Respondents explain, Petitioners' assumption that common law fraud necessarily requires a showing of plaintiff reliance is incorrect. *See* Resp. Br. at 26-33.

wire fraud cases do not require plaintiff-reliance is because they impose criminal liability for uncompleted schemes to defraud, and a scheme to defraud must be completed and cause injury before civil liability will arise. That certainly is one difference, as the Court suggested in *Neder*. 527 U.S. at 25. But as this Court has also recognized, criminal mail fraud liability can also be imposed for completed frauds that do not involve reliance on misrepresentations made directly to the victims.

For example, in *Carpenter v. United States,* 484 U.S. 19 (1987), a *Wall Street Journal* reporter who wrote a daily column "Heard on the Street," which discussed selected stocks, was convicted of mail and wire fraud. *Id.* at 22-24. The information in the column was considered the *Journal*'s confidential information prior to its publication. *Id.* at 23, 26. The reporter devised a scheme with two brokers whereby he gave them advance information about the content and timing of the columns. *Id.* The brokers traded based on the probable impact the column would have on the market and, over a four month period, recovered net profits of about $690,000. The primary question considered by the Court was whether the confidential information was the *Journal*'s property; however, the Court also considered the further argument that the reporter's conduct did not amount to fraudulent activity proscribed by the mail fraud statute. *Id.* at 27. Even though this completed scheme to defraud did not involve direct misrepresentations to the *Journal* upon which it relied, the Court nevertheless upheld the mail and wire fraud convictions:

> [T]he words "to defraud" in the mail fraud statute have the "common understanding" of "wronging one in his property rights by dishonest methods or schemes, and usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." The concept of "fraud" includes the act of embezzlement, which is "the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another."

Id. (internal citations omitted). Indeed, *amicus* Washington Legal Foundation ("WLF") concedes that embezzlement is a type of scheme to defraud even though a victim of embezzlement does not rely on the misrepresentations by an embezzler. *See* WLF Br. at 13, n.3.

Similarly, in *Schmuck v. United States*, 489 U.S. 705 (1989), defendant Schmuck was convicted of "devising and executing a scheme to defraud Wisconsin retail automobile customers," *id.* at 711, that continued successfully for fifteen years. Schmuck hired a man known only as "Fred" to turn back the odometers on used cars and then sold them to unwitting dealers, who in turn sold them to retail customers. *Id.* Schmuck and members of his operation never dealt directly with the retail customers. Any "misrepresentations" Schmuck made were directed to the unwitting used car dealers. But those dealers were neither the intended nor the actual victims of his scheme. Even though the used car dealers paid higher prices to Schmuck for the cars, they suffered no monetary loss, presumably because they in turn charged higher prices to the retail

customers. Thus, the retail customers were the intended and actual victims of Schmuck's scheme – even though he had no direct contact or relationship with those customers and those customers were unaware of Schmuck's existence. *Id.* at 707.[9] This Court affirmed Schmuck's conviction for defrauding those retail automobile customers. *Id.* at 722.

These cases illustrate what this Court held long ago in *Durland v. United States*, 161 U.S. 306, 312 (1896), that the mail fraud statute does not reach "only such cases as, at common law, would come within the definition of 'false pretences.'" Section 1341 punishes "any" scheme or artifice to defraud, even those not involving traditional reliance by the victim on a direct misrepresentation by the defendant. Thus, Petitioners' suggestion that the common law concept of reliance by the plaintiff be engrafted onto the mail fraud statute is incompatible with the statute itself, and "plainly [has] no place" there. *Neder*, 527 U.S. at 25.

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[9] In addressing the precise question presented in *Schmuck* -- whether the mailing of title registrations by the retail customers was necessary to the execution of the scheme for the purposes of Section 1341 -- the Court acknowledged the key role of the intermediary dealers who relied on Schmuck's misrepresentations, explaining that had title not successfully passed to the retail customers it "would have jeopardized Schmuck's relationship of trust and goodwill with the retail dealers upon whose unwitting cooperation his scheme depended." *Schmuck*, 489 U.S. at 714.

II. THE *HOLMES* TEST IS MORE THAN SUFFICIENT TO ADDRESS THE POLICY CONCERNS RAISED BY PETITIONERS AND THEIR *AMICI*.

A. The *Holmes* Test Already Requires a "Direct Relationship" Between the Injury and the Alleged Fraud.

Petitioners and their *amici* argue that unless the Court modifies *Holmes* with a strict plaintiff-reliance requirement in mail and wire fraud cases, businesses will face runaway RICO liability. *See, e.g.*, Pet. Br. at 37-39; McKesson Corp. Br. at 29-35; Chamber of Commerce Br. at 21-30. But when Petitioners and their *amici* try to identify what, exactly, the reliance requirement would add to the analytical mix in order to provide this supposedly essential safeguard, they reveal that the *Holmes* test already provides it. Petitioners' key public policy argument bears this heading: "A Reliance Requirement Ensures A Direct Relationship Between The Injury And The Alleged Fraud, Preventing The Over-Federalization Of Traditional State Law Claims." Pet. Br. at 39. And *amicus* McKesson Corporation states that "[a]doption of a third-party reliance exception . . . would represent a significant retreat from this Court's decisions in *Holmes* and *Anza* [which] held that there must be 'some direct relation between the injury asserted and the injurious conduct alleged.'" McKesson Br. at 33 (quoting *Holmes*, 503 U.S. at 268; *Anza*, 126 S. Ct. at 1996).

Respondents' position involves no "retreat" whatsoever from *Holmes* and its strict requirement for

a "direct relationship between the injury and the alleged fraud." The existence of that requirement is simply not at issue. Respondents and IAIR propose only that plaintiffs be permitted to meet it, and prove the "direct relationship" between fraud and injury, using the flexible, but demanding, fact-specific criteria set forth in *Holmes*. As Justice Thomas recognized in his *Anza* dissent, while "'[r]eliance [by plaintiff] is doubtless the most obvious way in which fraud can cause harm, . . . it is not the only way.'" *Anza*, 547 U.S. at 478 (quoting *Loiselle*, 303 F.3d at 104).

B. This Case, Like Those in the Insurance Company Fraud Context, Illustrates That the *Holmes* Criteria Can Be Met in the Absence of Plaintiff-Reliance Without in Any Way Weakening *Holmes*.

Neither Petitioners nor their *amici* seriously argue that Respondents fail to satisfy the *Holmes* proximate cause test.[10] Nor do they explain why any particular injustice would result from RICO liability in these circumstances if Respondents proved their case at trial. This is unsurprising, since under the *Holmes* criteria, Respondents' injuries – like those of a typical defrauded insurance company but unlike those of the plaintiffs in *Holmes* or *Anza* – were directly caused by Petitioners' fraud.

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[10] In fact, *amicus* Washington Legal Foundation admits that "[a]lthough Phoenix Bond has no direct relationship with Bridge, it makes out a quite plausible case that, if its allegations are proven accurate at trial, its injuries were caused by Bridge's bidding scheme." WLF Br. at 13.

1. The first *Holmes* criteria is whether it is problematic to determine damages attributable to defendant's misconduct "as distinct from other . . . factors." *Holmes*, 503 U.S. at 269. This was a major problem for the *Holmes* plaintiff, the Securities Investor Protection Corporation, suing on behalf of customers of a failed broker-dealer. The immediate cause of the customers' losses was the failure of the broker-dealer, which was, in turn, allegedly caused by defendants' misconduct. This meant that "the district court would first need to determine the extent to which [the investors'] inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets." *Holmes*, 503 U.S. at 273. The *Anza* plaintiff, who alleged that a competitor defrauded state tax authorities and used the savings to lower its prices, faced the same problem:

> [Defendant] could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud. It may have received a cash inflow from some other source or concluded that the additional sales would justify a smaller profit margin. Its lowering of prices in no sense required it to defraud the state tax authority. Likewise, the fact that a company commits tax fraud does not mean the company will lower its prices; the additional cash could go anywhere from asset acquisition to research and development to dividend payouts.

Anza, 547 U.S. at 458-59 (also noting that "it would require a complex assessment to establish what

portion of [plaintiff's] lost sales were the product of [defendant's] decreased prices").

Here, by contrast, the causal chain between Petitioners' submission of improper additional bids and Respondents' loss was direct. Petitioners have not, and cannot, identify any "other factors" analogous to the complex variables present in *Holmes* or *Anza* that meaningfully affected the auction process and could have led Respondents to lose the tax liens on which they properly bid. The same would be true in the context of many insurance company frauds, as explained in Section III below, where the gatekeeping function of the regulators is the only obstacle between the wrongdoers and their misappropriation of an insurance company's assets.

2. The second *Holmes* criteria is whether the court would have to "adopt complicated rules apportioning damages among plaintiffs" with "different levels of injury" to prevent "multiple recoveries." *Holmes*, 503 U.S. at 269. This was a problem in *Holmes* because "the district court would have [had] to find some way to apportion possible respective recoveries by the broker-dealers and the customers." *Id.* at 273. There are no such "multiple recovery" concerns here because, as the Seventh Circuit explained, Respondents were "[t]he *only* injured parties" in the alleged scheme. Pet. App. at 5a (emphasizing that "Cook County did not lose even a penny" because "each winning bidder always pays all back taxes and interest," and the "property owners are indifferent to who acquires the[ir] tax lien[s]" because the penalty is at 0%). The same would be true in the insurance insolvency context because the receiver stands in the shoes of the

insolvent insurance company, suing to recover funds stolen directly from its coffers. As explained in Section III below, other, derivatively injured parties, such as policyholders and creditors, generally cannot sue the wrongdoers and instead must file claims in the receivership or liquidation court, where the proceeds of the receivers' recoveries are distributed. And like Cook County in this case, state insurance regulators who received and relied on the wrongdoers' false statements have no monetary loss to recover in a RICO or any other civil action. The state insurance commissioner acting as receiver has the sole ability to act on behalf of the insolvent insurance company, which is the only entity with a direct financial injury from a looting scheme.

3. The third *Holmes* criteria is whether the most "directly injured victims" can "vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes*, 503 U.S. at 269-70. This criteria cut against the *Holmes* plaintiff because "those directly injured, the broker-dealers, could be counted on to bring suit for the law's vindication" and had, in fact, sued in that case through their trustees. *Id.* at 273. For the same reasons just stated, there is no one else with a financial incentive to "vindicate the law as private attorneys general" in this case, and no one even capable of doing so in the insurance insolvency context. The fact that law enforcement authorities could criminally prosecute RICO violators is immaterial to this factor. That would be true in nearly every RICO case, and *Holmes* explicitly focuses on enforcement by "private attorneys general," not the State. *Id.* at 269-70.

In short, cases like this one and those in the insurance insolvency context show that the *Holmes* proximate cause test is perfectly capable of sorting plaintiffs with direct injuries from those without them. A plaintiff-reliance requirement would be a pointless deviation from *Holmes*, and one that finds no support in the mail fraud statute or Section 1964(c).

III. IMPOSING A PLAINTIFF-RELIANCE REQUIREMENT WOULD UNDERMINE THE ABILITY OF INSURANCE RECEIVERS TO RECOVER ASSETS OF INSURANCE COMPANIES MISAPPROPRIATED THROUGH FRAUDULENT SCHEMES AND UNDULY HARM INSOLVENT INSURANCE COMPANIES AND THEIR POLICYHOLDERS AND CREDITORS.

Insurance companies are attractive targets of fraud because they are repositories of huge sums of money derived from policyholders' premium dollars. For this reason, the primary goal of insurance regulation is to protect policyholders so their premium dollars will be available to pay claims when they come due. Consequently, states require that any change of control for an insurance company be approved by insurance regulators in the state in which the company is domiciled. The change of control or "Form A" process generally requires that the proposed acquiring party disclose information about, among other things, the method of acquisition, the identity and background of the ultimate controlling party and associated persons, the nature, source and amount of consideration to be paid for the acquisition, and the

future plans for the insurance company. *See, e.g.*, Ark. Code Ann. § 23-63-508 (2008); 215 Ill. Comp. Stat. § 5/131.5 (2008); Iowa Code § 521A.3 (2008); La. Rev. Stat. Ann. § 22:1004 (2008); Minn. Stat. § 60D.17 (2007); Mo. Rev. Stat. § 382.050 (2007). It is typically a criminal offense willfully or knowingly to make false statements in connection with a Form A application. *See, e.g.*, Ark. Code Ann. § 23-63-522 (2008); 215 Ill. Comp. Stat. § 5/131.24 (2008); Minn. Stat. § 60D.09 (2007); Mo. Rev. Stat. § 382.275 (2007).

After acquisition, insurance regulators continue to monitor a company's activities to assure that it does not become a victim of fraud. For example, state insurance codes require that each insurance company domiciled in that state file an Annual Statement disclosing financial information relating to the insurance company, including information relating to investments. *See, e.g.*, 215 Ill. Comp. Stat. § 5/136 (2008); Minn. Stat. § 60A.13 (2007); Miss. Code Ann. § 83-5-55 (2008); Mo. Rev. Stat. § 375.041 (2007); R.I. Gen. Laws § 27-12-1 (2007); Tenn. Code Ann. § 56-1-501 (2008). It is also a criminal offense for an insurance company director to subscribe to an Annual Statement knowing it to contain any material false statement. *See, e.g.*, 215 Ill. Comp. Stat. § 5/139 (2008); Miss. Code Ann. § 83-5-69 (2008); Mo. Rev. Stat. § 374.216 (2007); Tenn. Code Ann. § 56-1-503 (2008).

Thus, in order to misappropriate insurance company assets, a crook must necessarily get past the insurance regulator gatekeepers by either filing false and misleading Form A applications concealing the real controlling party or source of the funds for the

acquisition, or by filing annual statements that include false and misleading statements about the nature and quality of the company's investments and assets.[11] In

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[11] For example, Charles Christopher and Wayne Reeder wanted to buy two insurance companies. They represented to the regulators that if the regulators approved the purchases, they would strengthen the financial condition of the companies by contributing valuable real estate, owned by Reeder, to the companies. They promised the regulators that by the time the purchases were approved all existing liens on the property would be paid in full. But Christopher and Reeder broke their promise. When the regulators approved the purchases, the liens had not been paid – a fact that was hidden from the regulators. Within weeks of obtaining control of the insurance companies, Christopher and Reeder diverted approximately $40 million of insurance company money to their own accounts, using the funds to clear the liens and pay off other personal and business debts. Both companies failed, of course, unable to recover from the looting. Christopher and Reeder were both convicted of wire fraud. *United States v. Christopher*, 142 F.3d 46, 47 (1st Cir. 1998) and *United States v. Reeder*, 170 F.3d 93, 97 (1st Cir. 1999).

Similarly, Lawrence Neadle gave false financial information to regulators in order to obtain approval to operate a property and casualty insurer in the Virgin Islands. This misconduct was discovered after the insurer's policyholders suffered more than $37 million of losses in a hurricane, none of which the insurer could pay. Neadle pleaded guilty to mail fraud. *United States v. Neadle*, 72 F.3d 1104 (3d Cir. 1995).

In one of the most costly insurance company frauds in history, Martin Frankel and others created an entity called the Thunor Trust to conceal Frankel's acquisition of seven insurance companies in five states. Immediately upon acquisition of each of the companies, Frankel liquidated their assets and transferred them to his control at a Swiss bank account. He concealed his ongoing fraud by filing false annual statements with insurance regulators in multiple states. Over the course of the ten years

those circumstances where wrongdoers succeed in misappropriating an insurance company's assets through fraud on the regulators, and such misappropriation results in the company's insolvency, the state's insurance commissioner becomes the court-appointed receiver. *See, e.g.*, Ga. Code Ann. § 33-37-17 (2007); Minn. Stat. § 60B.21 (2007); Ohio Rev. Code Ann. § 3903.18 (2008); R.I. Gen. Laws § 27-14.3-22 (2007). Such receivers are directed by their respective receivership courts to administer the affairs of the insolvent insurance company. To this end, the corporate authority of the insolvent company is placed in the hands of the receiver, and title to all assets and causes of action is vested by operation of law in the receiver. *See, e.g.*, Ga. Code. Ann. § 33-37-20 (2007); Minn. Stat. § 60B.25 (2007); Ohio Rev. Code Ann. § 3903.21 (2008); R.I. Gen. Laws § 27-14.3-25 (2007). Receivers locate, marshal and take into possession all assets of the insolvent company and are vested by operation of law with the authority to prosecute any action which may exist on the company's behalf, as well as on behalf of its creditors, policyholders, and shareholders, against any culpable parties. *See, e.g.*, Ga. Code. Ann. § 33-37-20 (2007); Minn. Stat. § 60B.25 (2007); Ohio Rev. Code Ann. § 3903.21 (2008); R.I. Gen. Laws § 27-14.3-25 (2007). Creditors and policyholders who have claims against those assets must bring them in the receivership court, where any

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that Frankel's scheme continued, he looted over $200 million dollars of the insurance companies' assets. Frankel pleaded guilty to twenty counts of wire fraud, one violation of RICO § 1962(c), and RICO conspiracy in violation of 18 U.S.C. § 1962(d) in *United States v. Martin R. Frankel, et al.*, No. 3:99-CR-235 (D. Conn.).

recovered assets are then distributed. *See, e.g.*, Ga. Code. Ann. §§ 33-37-21, 33-37-41 (2007); Minn. Stat. §§ 60B.26, 60B.44 (2007); Ohio Rev. Code Ann. §§ 3903.22, 3903.42 (2008); R.I. Gen. Laws §§ 27-14.3-26, 27-14.3-46 (2007).

RICO has been a vital tool for receivers of insurance companies victimized by fraudulent schemes, and, under the receivership and liquidation process, those benefits have inured to creditors and policyholders (as well as taxpayers, who fund the state guaranty funds).[12] RICO claims are not subject to complex and uneven state laws regarding contribution and joint tortfeasor liability. RICO also allows for nationwide service of process and has liberal venue requirements, both of which are essential in complex, multi-state schemes. *See* 18 U.S.C. § 1965(b). RICO has a reasonable, predictable limitations provision, *see Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987) (borrowing four year statute of limitations from Clayton Act for RICO civil actions), while state law actions are subject to myriad local statutes of limitations.

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[12] The Receiver of American Universal and Canadian Universal Insurance Companies, which were looted by Charles Christopher and Wayne Reeder, brought a RICO action in the District of Rhode Island against the looters and those who helped them obtain control of the companies. *See Marques v. Sequa Corp., et al.*, No. 92-512L, (D. R.I.). The Receivers of the seven insurance companies victimized by the Martin Frankel fraud have brought a RICO action in the Southern District of Mississippi against Frankel and his co-conspirators. *See Chaney, et al. v. ALA Acquisitions I, Inc., et al.*, No. 3:00CV359LN (S.D. Miss.).

Barring RICO claims with mail and wire fraud predicates based on deception of state insurance regulators would seriously hamper receivers' ability to obtain these benefits from RICO. It would thereby leave many receivers unable to seek civil RICO remedies that Congress permitted in Section 1964(c) from wrongdoers who indisputably violated RICO and are subject to criminal RICO and mail or wire fraud liability. In cases where the wrongdoers have been found criminally liable, RICO's treble damage provision is an especially powerful weapon to facilitate timely settlements for the benefit of victimized policyholders and creditors. *See* 18 U.S.C. § 1964(c). The position Petitioners advance concerning RICO would leave rampant deception of state insurance regulators largely unpunished by civil remedies, particularly if receivers also could not, as Petitioners argue, bring common law fraud claims based on such deception.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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v.

PHOENIX BOND & INDEMNITY CO., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR MCKESSON CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR MCKESSON CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS[1]

McKesson Corporation respectfully submits this brief as *amicus curiae* in support of petitioners.

INTEREST OF *AMICUS CURIAE*

McKesson Corporation is the nation's leading health care and information technology company, and is the largest pharmaceutical distributor in North America. McKesson is responsible for the distribution of one-third of the medicines used in North America, and supplies more than 25,000 healthcare locations across the country, ranging from Wal-Mart to the Department of Veteran Affairs to community pharmacies. McKesson employs 30,000 people, and is among the Global Fortune 500.

Although the Racketeer Influenced and Corrupt Organizations Act (RICO) serves an important purpose to deter and punish organized criminal conduct, RICO has been extended beyond congressional intent in some circumstances and

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

misused against businesses and other organizations because of the statute's treble damages provision. For example, the court of appeals in this case unnecessarily expanded the scope of liability under civil RICO when it held that a plaintiff seeking treble damages as a person who was "injured" "by reason of" the defendant's misrepresentation, need not allege that he relied on the purported misrepresentation by the defendant (or even received it). That ruling overrides an important statutory check on the award of treble damages that was established in the "by reason of" requirement, and will lead to further misuse of RICO.

The expansion of civil RICO into ordinary commercial transactions by suits filed on behalf of disappointed parties to such transactions, or by competitors and other individuals, has led to costly litigation and the potential for billions of dollars of liability. Again, this is particularly true in the context of class actions, where class certification often terminates cases, even where defendants have meritorious defenses, because the looming costs and possible consequences (oftentimes, no matter how remote) compel the defendant to settle. Because businesses in the health care and pharmaceutical industries have been the targets of such actions, *amicus curiae* has a substantial interest in the outcome of this case which will determine the scope of civil RICO liability in a variety of circumstances.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, tit. IX, 84 Stat. 941, in 1970 to combat the growing influence of organized crime over the national economy. RICO thus lists in Section 1962 a series of prohibited activities, including making it unlawful for any person who is employed by or associated with an enterprise engaged in interstate commerce "to conduct or participate * * * in the conduct of" the affairs of that enterprise "through a pattern of racketeering activity." 18 U.S.C. § 1962(c). "Racketeering activity" is defined by RICO as any one of a host of listed acts, including any act that is indictable under dozens of federal criminal statutes such as the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343. 18 U.S.C. § 1961(1).

RICO establishes various criminal penalties as well as public and private civil remedies. RICO allows, *inter alia*, for private civil actions to compensate victims of racketeering and provides that any person who was "injured in his business or property *by reason of* a violation of section 1962" may recover "threefold the damages he sustains" and attorneys' fees. *See* 18 U.S.C. § 1964(c) (emphasis added).

The availability of treble damages in a private civil action under RICO has led plaintiffs to attempt to invoke civil RICO in contexts entirely unrelated to

organized crime. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 500 (1985). Individuals and businesses motivated by the extraordinary remedy of treble damages frequently file suit against counterparties to commercial transactions, against competitors, and against other businesses, most often predicated on purported violations of the federal mail and wire fraud statutes. Pleading standards that adhere to the statutory requirements for recovery are thus necessary to prevent the misuse of civil RICO actions for treble damages as a means of procuring unwarranted settlements through threat of litigation against legitimate commercial enterprises.

The instant dispute involves one of those pleading standards, and poses the question whether a plaintiff who asserts he was "injured" "by reason of" a RICO violation, in order to recover treble damages under Section 1964(c) based upon mail fraud, must establish that he relied on the fraud and that such reliance was justified. *Amicus curiae* submits that a civil RICO plaintiff must make such a showing because, under well-settled applications of this Court's precedent, this condition follows from common law principles that undergird the "injured" "by reason of" requirement of civil RICO.

A.

The common law guides any interpretation of the private civil RICO remedy set forth in Section 1964(c). This Court relied on common law principles when it construed the meaning of the "by reason of" requirement of Section 1964(c) in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and again in the recent case of *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). The Court explained that civil RICO was modeled after Section 4 of the Clayton Act and that the Court had previously construed the Clayton Act's near-identical language, in *Associated General Contractors of California, Inc. v. State Council of Carpenters*, 459 U.S. 519 (1983), to be "subject to constraints comparable to well-accepted common-law rules applied in comparable litigation." 459 U.S. at 533. A civil RICO action under Section 1964(c) that is predicated on federal mail fraud is most comparable to common law fraud litigation.

Learned treaties such as the *Restatement (Second) of Torts*, as well as the decisions of this Court applying those authorities, have long held that the common law requires a plaintiff in a fraud action to demonstrate not only his *own* reliance in order to recover for a misrepresentation, but also that that reliance was justifiable. A defendant is liable at common law only when it seeks to *influence* the plaintiff with its misrepresentation.

Respondents in the instant action cannot satisfy this standard because they not only failed to allege

any reliance on the alleged misrepresentation, but they in fact could not have relied on the alleged misrepresentation because they never even received it.

B.

Notwithstanding the well-settled common law principles of fraud, a handful of federal courts have held that a plaintiff may recover treble damages under Section 1964(c) as a person who was "injured" "by reason of" alleged mail or wire fraud merely by showing that some third party relied on the alleged misrepresentation or fraudulent omission. But the common law creates no such exception to justifiable reliance by the plaintiff in fraud cases. The *Restatement (Second) of Torts* provides that recovery by a plaintiff is allowed based on third party receipt of the alleged fraud only where the misrepresentation is communicated by the third party to the plaintiff, the plaintiff relies on the misrepresentation, and the defendant had expected that its misrepresentation would be repeated to the plaintiff and that the plaintiff would rely upon it. Other exceptions to the showing of justifiable reliance directly by the plaintiff are limited to where there is a special relationship between the plaintiff and a third party that relied upon the misrepresentation, such as the relationship between a principal and an agent or a parent and a child.

The court of appeals was wrong in its view that, because the federal mail fraud statute authorizes prosecution by the government under Section 1341 for a "scheme" to defraud without having to prove injury or reliance, the same standard applies to a private action for treble damages under the differently worded civil RICO provision Section 1964(c). A "scheme" to defraud is nothing more than an uncompleted fraud which does not cause injury and, by definition, no treble damages can be recovered under civil RICO in such circumstances because the plaintiff was not "injured" as required by Section 1964(c).

Respondents attempt to create a presumption of reliance here based on their participation in a public auction, but no such presumption applies outside the field of securities litigation. And, even where the Court has presumed reliance in securities cases, respondents here still could not prevail because such a fraud on the market theory requires that the defendant have made a public material misstatement. Reliance is presumed only in such circumstances because it is assumed that the securities markets will automatically misadjust to the misinformation, making individualized reliance unnecessary, but no comparable circumstances existed here.

C.

The threat of class-wide civil RICO damages, particularly when they would be trebled under 18 U.S.C. § 1964(c), poses a real obstacle to major corporations across all industries who have become targets of class action lawsuits that transform ordinary fraud allegations into civil RICO actions. Such lawsuits often force legitimate businesses to forgo the possibility of defending against such fraud allegations on the merits and to, instead, settle unsubstantiated claims because of the potentially staggering liability and litigation expenses that are at risk for even the most meritless claim.

The requirement of justifiable reliance to recover treble damages as a person "injured" "by reason of" a RICO fraud provides an important protection against abusive litigation. It ensures that only those directly injured by racketeering can recover as Congress intended and it precludes plaintiffs from maintaining costly, untenable claims at early stages of litigation in an attempt to obtain damages from alleged derivative harms. Also, the justifiable reliance requirement often is considered an individualized determination in the context of class actions that precludes certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Without the justifiable reliance requirement, class actions will proliferate and impose a great burden on the national economy.

Finally, even if the Court were to choose to depart from common law principles and allow recovery of treble damages under 18 U.S.C. § 1964(c) where a third party, rather than the plaintiff, relied upon the misrepresentation, such recovery should be limited to the circumstance where the plaintiff is the most immediate victim with the only possibility of recovery. Such an approach would, at least, limit derivative liability because no other party could claim a more direct injury due to the purported fraud.

ARGUMENT

CONGRESS INCORPORATED COMMON LAW PRINCIPLES, INCLUDING JUSTIFIABLE RELIANCE BY THE PLAINTIFF, INTO PRIVATE CIVIL RICO ACTIONS PREDICATED ON MAIL FRAUD

Congress specified that a person can recover treble damages in a private civil RICO action under 18 U.S.C. § 1964(c), only if the plaintiff was "injured in his business or property by reason of" a RICO violation. Where the alleged RICO violation is predicated on mail fraud, a plaintiff is "injured" "by reason of" the defendant's alleged mail fraud according to common law fraud principles only if the plaintiff justifiably relied on the defendant's fraudulent conduct.

A. This Court's Longstanding Interpretation Of The "By Reason Of" Requirement In The Civil RICO Cause Of Action, 18 U.S.C. § 1964(c), Relies On The Common Law

1. Interpretation of Section 1964(c) is guided by the common law principles applicable to "comparable litigation," and a Section 1964(c) civil RICO cause of action predicated on mail fraud is comparable to a common law fraud action

a. Under this Court's well-settled precedent, the common law principles of "comparable litigation" are incorporated into civil RICO actions under Section 1964(c). In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and again in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), the Court relied on common law principles and construed the "injured" "by reason of" requirement of Section 1964(c) to mandate that a plaintiff demonstrate that the civil RICO violation proximately caused his injury.

The *Holmes* Court reasoned that "common-law principles" must undergird interpretation of Section 1964(c), in part, because that provision cannot be construed so that civil RICO "allow[s] all factually injured plaintiffs to recover." *Holmes*, 503 U.S. at 266, 267. The Court explained in *Holmes* "that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust law, § 4 of the Clayton Act." Section 4 provides that an antitrust plaintiff seeking treble damages must establish that he was "injured" "by

reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). Thus, when the *Holmes* Court was called upon to interpret the "injured" "by reason of" requirement of civil RICO, it emphasized that the Court already had construed that near identical language of the Clayton Act in *Associated General Contractors of California, Inc. v. State Council of Carpenters*, 459 U.S. 519 (1983), to require federal antitrust plaintiffs to meet various common law requirements. *Holmes*, 503 U.S. at 267-268; *see also Anza*, 126 S. Ct. at 1996.

The Court's decisions in *Associated General Contractors*, *Holmes*, and most recently *Anza* were guided by the understanding that "Congress simply assumed" that the broad treble damages remedies provisions in the Clayton Act and in RICO "would be subject to constraints comparable to well-accepted common law rules applied in comparable litigation." *Associated Gen. Contractors*, 459 U.S. at 533; *see also Holmes*, 503 U.S. at 267; *Anza*, 126 S. Ct. at 1996. Accordingly, the Court has held that "a number of judge-made rules [that] circumscribed the availability of damages recoveries in * * * tort" are incorporated into the "injured" "by reason of" requirement for treble damages under the Clayton Act and civil RICO. *Associated Gen. Contractors*, 459 U.S. at 532, 535; *see also Holmes*, 503 U.S. at 267; *Anza*, 126 S. Ct. at 1996.

b. The court of appeals in the instant case ignored the impact of this well-settled precedent. The court restricted its analysis to whether a proximate

cause standard was satisfied, and did not consider whether common law principles also require that a plaintiff, who alleges civil RICO predicated on a fraud-based racketeering activity, must meet the common law fraud requirement of justifiable reliance by the plaintiff. Pet. App. 4a. The court's failure to impose that common law requirement is contrary to this Court's mandate that the "injured" "by reason of" language used by Congress imposes the "well-accepted common-law rules" that would be "applied in comparable litigation." *Associated Gen. Contractors*, 459 U.S. at 533.

Where, as here, a plaintiff seeks treble damages under civil RICO Section 1964(c) based on alleged injury "by reason of" racketeering in violation of Section 1962 predicated on a pattern of mail fraud in violation of 18 U.S.C. § 1341, the "comparable litigation" that guides this Court's analysis is a common law fraud action. This Court already has considered the question with respect to federal criminal mail fraud actions brought directly under 18 U.S.C. § 1341 and held in *Neder v. United States*, 527 U.S. 1 (1999), that such criminal actions are comparable to "actionable 'fraud' [that] ha[s] a well-settled meaning at common law." *Id.* at 22. Civil RICO actions like the instant case, which are based on alleged injury "by reason of" underlying federal mail fraud, are, *a fortiori*, more comparable to common law fraud than the criminal prosecution at issue in *Neder*. Indeed, *Anza* and *Holmes* demonstrate that imposition of common law principles in civil RICO

actions that circumscribe the recovery of treble damages are derived from RICO Section 1964(c)'s "injury" and "by reason of" requirements, *Anza*, 126 S. Ct. at 1996; *Holmes*, 503 U.S. at 268, and not from the predicate racketeering activity.

2. Justifiable reliance by the plaintiff is a necessary component of causation in any common law fraud action

a. Common law principles have long required a plaintiff to demonstrate not only *his own* reliance on the alleged misrepresentation or fraudulent omission, but also that his reliance was *justifiable*. The *Restatement (Second) of Torts* explains that "Liability for Fraudulent Misrepresentation" requires a plaintiff to suffer "pecuniary loss caused to him by his justifiable reliance upon the misrepresentation." *Restatement (Second) of Torts* § 525 (1977). Accordingly, the defendant is "subject to liability" only if the plaintiff "justifiably relies upon the truth of the matter misrepresented * * *." *Id.* § 546. The comments to Section 546 of the *Restatement* further explain that "[f]or a misrepresentation to be a cause in fact of the pecuniary loss * * *, the plaintiff must have relied upon the misrepresentation in incurring the loss." *Id.* § 546 cmt. b; *see also id.* § 537 cmt. a ("The recipient of a fraudulent misrepresentation can recover from the maker for his pecuniary loss only if he in fact relies upon the misrepresentation in acting or in refraining from action, and his reliance is a substantial factor in bringing about the loss.").

These sections of the *Restatement (Second) of Torts* constitute authoritative statements of the common law. In *Field v. Mans*, 516 U.S. 59, 70 (1995), the Court described the *Restatement (Second) of Torts* as "the most widely accepted distillation of the common law of torts." Indeed, citing to the *Restatement (Second) of Torts* in other contexts, this Court has understood common law fraud to impose liability "'for pecuniary loss caused' to one who justifiably relies upon th[e] misrepresentation." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343 (2005) (quoting *Restatement (Second) of Torts* § 525); *see also Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988) ("agree[ing]" that reliance is an element of a Rule 10b-5 cause of action based upon the fact "that reliance is and long has been an element of common-law fraud") (citing *Restatement (Second) of Torts* § 525 and W. Page Keeton, et al., *Prosser & Keeton on the Law on Torts* § 108 (5th ed. 1984)).

Relying on the *Restatement (Second) of Torts*, the Court in *Field v. Mans* thus held that the Bankruptcy Code's exception for the discharge of debts due to "false pretenses, a false representation, or actual fraud" requires that a plaintiff demonstrate his own justifiable reliance upon the fraudulent misrepresentation, *Field*, 516 U.S. at 61 (quoting 11 U.S.C. § 523(a)(2)(A)), even though the statutory text neither imposes a reliance requirement nor specifies what degree of reliance is required, *id.* at 66. Like this Court's construction of Section 1964(c) in *Holmes* and *Anza*, the *Field* Court concluded that "there is no reason to doubt Congress's

intent to adopt a common-law understanding of the terms it used," *id.* at 70, and explained that a "'plaintiff's reliance on the misrepresentation must be justifiable * * *.'" *Id.* at 70-71 (quoting *Restatement (Second) of Torts* § 545A cmt. b); *see also id.* at 70-72 (explaining by example why a plaintiff's justifiable reliance on the purported fraudulent misrepresentation is required); *see also Dura Pharm.*, 544 U.S. at 343-344 ("[T]he common law has long insisted that a plaintiff in such a case show not only that had he known the truth he would not have acted but also that he suffered actual economic loss.") (citing *Pasley v. Freeman*, 3 T.R. 51, 65, 100 Eng. Rep. 450, 457 (1789), and *Freeman v. Venner*, 120 Mass. 424, 426 (1876)).

Other learned treatises are in accord with the *Restatement (Second) of Torts*. *Prosser and Keeton on the Law of Torts* explains that the "elements of the tort cause of action in deceit" include "[j]ustifiable reliance upon the representation on the part of the plaintiff" and "[d]amage to the plaintiff, resulting from such reliance." Keeton, *supra*, at 728.[2] It makes

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[2] The common law thus limited recovery to those who directly relied upon the purported fraudulent representation. As Professor W. Page Keeton explained: "The further removed a person is from the misstatement, the less the likelihood of reliance thereon, and it may be that justice cannot be administered successfully so as to permit anyone to recover who could prove reliance thereon." W. Page Keeton, *The Ambit of a Fraudulent Representor's Responsibility*, 17 Tex. L. Rev. 1, 8 (1938). Accordingly, "[t]here is * * * some justification for not holding a person liable to anyone he happens to cheat merely because he intended to cheat some one * * * ." *Ibid.*

clear that the common law dictates that "[n]ot only must there be reliance but the reliance must be justifiable under the circumstances." *Id.* at 749. Likewise, Justice Story's *Commentaries on Equity Jurisprudence* states that civil fraud requires that a plaintiff "must have been misled to his prejudice or injury." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 203, at 227 (13th ed. 1886).[3]

b. The legal theories articulated in these treatises have been widely applied in courtrooms across this country for more than 100 years. State and lower federal courts preclude recovery in fraud-based actions where a plaintiff fails to demonstrate his *own* justifiable reliance on the purported misrepresentation. *See, e.g.*, *Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo*, 148 F.3d 194, 196 (2d Cir. 1998) ("We hold that a plaintiff does not establish the reliance element of fraud for purposes of ERISA or New York law by showing only that a third party relied on a defendant's false statements."). "A person making a representation *is only accountable for its truth or honesty to the very person or persons whom he seeks to influence* * * * ." *Williamson v. Patterson*, 106 S.W.2d 753, 756 (Tex. Civ. App. 1937) (quoting

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[3] This Court has looked to common principles in other civil RICO contexts, including in *Beck v. Prupis*, 529 U.S. 494, 500 (2000), where the Court "turn[ed] to the well-established common law of civil conspiracy," 529 U.S. at 500, and relied on authorities such as the *Restatement (Second) of Torts* and earlier editions of *Prosser & Keeton on the Law on Torts*, *id.* at 501.

Thomas M. Cooley, *Cooley on Torts* 493 (2d ed. 1888)) (emphasis added); *Greenville Nat'l Bank v. National Hardwood Co.*, 217 N.W. 786, 787 (Mich. 1928) (same).[4]

The common law requirement that a plaintiff's reliance be justifiable also is widely applied. This Court, in *Field*, demonstrated that among the 46 States requiring reliance in a fraud-based common law action, 36 of those States require that the plaintiff's reliance upon the misrepresentation be justifiable. *Field*, 516 U.S. at 72-74 and nn.10-12 (citing cases).[5] Thus, even to the extent stray rulings require something less (or more) than a plaintiff's own justifiable reliance, those few decisions would not reflect "the dominant consensus of common-law jurisdictions" on which this Court relies. *Id.* at 70 n.9.

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[4] The common law often further restricts liability to the *intended* recipients of the misrepresentation. The leading case on the scope of liability for a fraudulent misrepresentation, *Peek v. Gurney*, (1873) L.R. 6 H.L. 377, demonstrates that a plaintiff may not be able to recover even if he hears a misrepresentation, relies upon it, and suffers damage, where the defendant never intended the plaintiff to rely upon the misrepresentation. *See also Bechtel v. Bohannon*, 153 S.E. 316, 316-317 (N.C. 1930) ("An essential element of a cause of action for the recovery of damages for false and fraudulent representations is that the representations alleged to be false and fraudulent were made with intent that the plaintiff shall act * * * ."); *McCracken v. West*, 17 Ohio 16, 26 (1848) (same).

[5] Of the remaining 10 States, 5 required that the plaintiff show only his own reliance, and 5 mandated that the plaintiff's reliance be reasonable. *Id.* at 72-73.

Finally, as petitioners demonstrate (Pet. Br. 29-35), the clear majority of the federal courts of appeals that have considered the issue have required that a civil RICO plaintiff not only plead reliance, but that he also demonstrate his *own* reliance on the purported misrepresentation. *See, e.g., Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996) (civil RICO plaintiffs must "allege both that they detrimentally relied in some way on the fraudulent mailing and that the mailing was a proximate cause of the alleged injury to their business or property") (internal citation omitted);[6] *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001) (each member of putative RICO class action "must then prove reliance upon * * * alleged fraud"); *VanDenBroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th

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[6] The Fourth Circuit was described by the court below as a jurisdiction that allows the reliance requirement to be satisfied by a third party, *see* Pet. App. 7a (citing *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260, 263-264 (4th Cir. 1994)), but that is not so. The Fourth Circuit's subsequent decision in *Chisolm* makes clear that direct reliance by a plaintiff is required by that court (a rule that was in place both before and after the anomalous *Mid Atlantic Telecom* decision). Moreover, *Mid Atlantic Telecom* is no longer good law because that fact pattern (unlike the one in the instant case) clearly could not survive application of *Anza*. In *Mid Atlantic Telecom*, a competitor sued a rival company on the ground that the rival had defrauded customers (by claiming to offer lower prices for telephone services when it was in fact not offering them) which took customers away from its competitors. Just as in *Anza*, however, there can be no proximate cause because the customers, not the competitors, were the direct victims of the fraud. *Anza*, 126 S. Ct. at 1998.

Cir. 2000) (alleged misrepresentation must have been "calculated or intended to deceive persons of reasonable prudence and comprehension, and must also show that plaintiffs in fact relied upon that material misrepresentation"); *Appletree Square I, Ltd. P'ship v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994) ("In order to establish injury to business or property 'by reason of ' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts."); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360 (11th Cir.) ("when a plaintiff brings a civil RICO case predicated upon mail or wire fraud, he must prove that he was a target of the scheme to defraud and that he relied to his detriment on misrepresentations made in furtherance of that scheme") (internal quotations omitted), *cert. denied*, 537 U.S. 884 (2002).

3. The ruling below violates well-settled principles of common law fraud

In the instant case, respondents are purchasers of tax liens from a county and contend that petitioners, who also purchased tax liens from the county, submitted false affidavits to the county and that the county relied on the falsehoods when it awarded additional liens to petitioners at auction. Respondents thus claim harm because petitioners obtained more liens than petitioners were entitled to, which meant that respondents obtained fewer liens.

The district court correctly ruled that respondents lack standing to bring a civil RICO action in these circumstances, and dismissed the claim. The court of appeals erred when it reversed that ruling and held that respondents have standing even though they were not the recipients of, and did not rely on, any alleged misrepresentations. Indeed, as petitioners demonstrate (Pet. Br. 36-37), nothing in respondents' allegations even remotely demonstrates that petitioners sought to influence respondents in any way by petitioners' submission to the county of the purportedly false affidavits. *Williamson*, 106 S.W.2d at 756 (quoting Cooley, *supra*, at 493).

B. The Common Law Does Not Support The Judgment Below Allowing Respondents To Seek Treble Damages Without Any Showing That They Directly And Justifiably Relied On The Alleged Fraud

1. A third party's reliance on a fraud defendant's purported misrepresentation does not satisfy the common law fraud reliance requirement

a. Contrary to the well-settled common law principles analyzed above, a handful of federal courts have held that a plaintiff seeking treble damages based on a predicate of mail or wire fraud racketeering can satisfy civil RICO's requirement of injury "by reason of" the predicate violation, by demonstrating reliance of a third party, rather than direct reliance of the plaintiff, on the alleged

misrepresentation or fraudulent omission. *See, e.g.*, *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251 (2d Cir. 2004), *rev'd*, 126 S. Ct. 1991 (2006).

The common law does not permit such a reading. As discussed above (*see* pages 13-18), the *Restatement (Second) of Torts* and other common law authorities, including the rulings of this Court, dictate that plaintiffs, such as respondents, who seek to recover under common law fraud must demonstrate their own justifiable reliance on the fraudulent conduct. The court of appeals below was wrong to fashion an exception for a plaintiff merely because he claims that he was the "direct *victim*" of the misrepresentation, but where he was not the "direct *recipient*" (or was not a recipient at all, as in the instant case) "of the false statement." Pet. App. 7a (emphasis in original).

The common law of fraud allows recovery only in exceedingly narrow circumstances where a third party, rather than the plaintiff, is the original recipient of the alleged misrepresentation. The *Restatement (Second) of Torts* explains that recovery for a "Representation Made to a Third Person" is available only where (1) a misrepresentation is made to a third party, (2) the misrepresentation is communicated by the third party to the plaintiff, (3) the plaintiff relies upon the transmitted misrepresentation, *and* (4) the defendant had anticipated that the plaintiff would receive and rely upon the misrepresentation that the defendant had communicated to the third party. *Restatement (Second) of Torts* § 533; *see also Ellis v. Hale*, 373 P.2d

382, 385 (Utah 1962) (same) (citing the *Restatement (Second) of Torts* § 533).

Prosser and Keeton on the Law on Torts sets forth the same limited exception to the rule that a plaintiff must establish that he directly received and relied on the misrepresentation from the defendant. *Keeton, supra*, at 743-745. It explains that the rule of firsthand receipt and reliance by the plaintiff "has been followed by numerous American courts" without any exception that allows recovery based on reliance of a third party, including "in cases involving * * * similar remote investors, an assignee or subpurchaser from the one originally dealt with, casual bystander who overhears but is not expected to take action, and others who were not intended to be affected by the representation, with no special reason to expect them to act upon it." *Id.* at 743 (footnotes citing cases and emphasis omitted).

Along similar lines, a misrepresentation made to a third party and relied upon by that third party creates liability to a plaintiff derivatively harmed only where the third party is an agent of the injured plaintiff as a principal, *see Restatement (Second) of Agency* § 315 (1958) (allowing suit "whether the fraud is practiced upon the agent or upon the principal"), or in other cases that involve special relationships, such as a parent and a child, *see, e.g., Ruffing v. Union Carbide Corp.*, 764 N.Y.S.2d 462 (App. Div. 2d Dep't 2003) (parent-child relationship), *appeal dismissed*, 1 N.Y.3d 621 (2004); *Union Carbide Corp. v. Montell*

N.V., 9 F. Supp. 2d 405, 411-412 (S.D.N.Y. 1998) (valuation by an appraiser).

Such circumstances are not present in the instant case. Respondents were not in an agency or other special relationship with the county, who was the recipient of and relied on the alleged misrepresentations. Pet. App. 7a. And no leading treatise contemplates the third-party reliance of the sort the court of appeals endorsed. Pet. App. 7a ("A scheme that injures D by making false statement through the mail to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's.").

b. Any expansion of the narrow common law exception for third-party reliance would undermine the common law requirement that a fraud plaintiff's reliance be *justifiable*.

In the few circumstances where the common law recognizes recovery based on third-party reliance, either the plaintiff *himself* justifiably relied upon the transmitted misrepresentation or a third party in an *agency* or other *special* relationship with the plaintiff justifiably relied on the misrepresentation (proof of whether the agent's or parent's reliance was justifiable was charged to the ultimate plaintiff). But third-party reliance of the sort endorsed by the court of appeals makes no such inquiry into whether the plaintiff's actions were justifiable, and there would be no basis to impute the justifiability of a third party's reliance (here the reliance by the county) to

the plaintiff where there is no agency or other special relationship.[7]

2. Allowance of "scheme" liability for criminal prosecution under Section 1341 does not eliminate the common law reliance requirement for a person seeking civil RICO treble damages under Section 1964(c) for an alleged injury "by reason of" predicate mail fraud

The court of appeals also concluded that it "is unnecessary to show that the false statement was made to the victim" in a civil RICO action because the federal "mail fraud statute, 18 U.S.C. § 1341, defines a fraudulent *scheme* rather than a particular false statement, as the crime." Pet. App. 7a (emphasis in original). But that argument is wrong for two reasons.

First, the focus on "scheme" to defraud in Section 1341 conflates criminal liability under that provision with civil remedies under the differently worded civil

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[7] Nothing in the text of Section 1964(c) demonstrates *any* intent by Congress to depart from the common law requirement that a plaintiff in a fraud action demonstrate his own justifiable reliance on the alleged misrepresentation. By specifying that "[a]ny person" may recover treble damages *only* if he meets the Section 1964(c) requirement that he was injured "by reason of" the predicate RICO violation, including in fraud cases, Congress imposed the common law firsthand reliance requirement on *all* civil RICO fraud plaintiffs.

RICO provision, 18 U.S.C. § 1964(c), which is at issue here. This Court has explicitly recognized that a "scheme" to defraud for purposes of Section 1341 is distinct from "the completed fraud," *Neder*, 527 U.S. at 25, and that when Congress included "scheme" in the federal criminal mail fraud statute it could not have intended to include reliance or damages because the government need not demonstrate any injury in Section 1341 prosecutions. *Ibid.*

By contrast, when Congress enacted civil RICO it specified that a civil action for treble damages under Section 1964(c) is available only to a plaintiff who is "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Thus, Congress mandated that a civil RICO plaintiff under Section 1964(c) prove injury. Congress also mandated that such a civil RICO plaintiff meet the "by reason of" standard. Congress thereby made clear that not all violations of Section 1962 can serve as predicates for a civil RICO action under Section 1964(c). In the case of mail fraud in violation of Section 1341, a racketeering pattern of such conduct can constitute a violation of Section 1962, but it cannot serve as a predicate for a civil RICO action under Section 1964(c) unless the "injured" "by reason of" standard is met. A "scheme" to defraud cannot, by definition, meet that standard because a "scheme" alone causes no injury since it constitutes nothing more than an uncompleted fraud.

Second, even if a "scheme" were actionable under Section 1964(c), common law fraud rejects liability

based upon the existence of a mere scheme when the plaintiff fails to rely on a misrepresentation by the defendant. *See* pages 13-18 *supra*. Accordingly, courts have held that "misrepresentations made to accomplish the purpose of the scheme" impose no liability where "[t]he plaintiff fails to show that he is one of the class to which the representations were intended to be addressed * * * ." *Van Swall v. Derschug*, 257 N.Y.S. 206, 207 (App. Div. 4th Dep't 1932). Without having relied upon a misrepresentation, a plaintiff's "allegations in relation to such a scheme are therefore irrelevant." *Ibid.* The existence of a scheme does not matter because the "controlling question" is "[w]hom did the defendants intend to influence by their representations." *Greenville Nat'l Bank*, 217 N.W. at 787. Here, respondents did not allege that petitioners had any intent to influence them, but rather the allegation was that the alleged fraud was intended to influence the county.

The mere invocation of "scheme" liability does not transform derivative injuries into primary ones. In *Anza*, the Second Circuit described the purported racketeering activity as a fraudulent tax "scheme," but that characterization provided plaintiffs with no safe harbor from the Court's requirement that the alleged injury directly flow from the defendant's misrepresentation. *Anza*, 126 S. Ct. at 1995; *see also id.* at 1996 (describing the alleged racketeering activity in *Holmes* as a "scheme"). *Cf. Stoneridge Investment v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 770 (2008) (rejecting attempt to obviate reliance

requirement merely because of "scheme liability" because such liability, to be actionable, still requires a public misrepresentation which can be relied upon).

3. A presumption of reliance has no place in common law fraud, and thus is inapplicable to civil RICO predicated on mail fraud

As a last resort, respondents have attempted to somehow meet the reliance requirement by asserting that they relied on the "integrity of the allocation process" for the tax liens that was used by the county. Br. in Opp. 29. But that assertion is beside the point.

If fraud-based liability were to be presumed because of the absence of integrity in the county's allocation process (which it cannot be), then the only party that could plausibly be liable for fraud is the county. Such a claim and presumption would go to the county's representation that its process for allocating the tax liens would be run in a fair manner and the county's inducing respondents to participate in that process.

Indeed, what respondents ask this Court to do is to presume fraud-based reliance where a plaintiff relies upon the integrity of a quasi-market and suffers some loss. But even in the narrow circumstances where the Court has presumed reliance, such as in the field of securities where a defendant commits "fraud on the market" by publicly making material misstatements that affect the price

of a publicly traded security in a highly efficient market, a presumption applies only where the defendant has made publicly disseminated misrepresentations that will be relied upon and thus reflected in the now miscalculated value of the security. *Basic*, 485 U.S. at 247.[8] And a plaintiff seeking to invoke that fraud-on-the-market theory must demonstrate, rather than just presume, that the market is efficient. *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1 (1st Cir. 2005) (demonstrating rigorous standards required to prove an efficient market).

Respondents have made no such allegation here. In fact, it would have been patently nonsensical for petitioners to have made such a misrepresentation to induce respondents to participate in the auctions because petitioners received *no* benefit from respondents' participation; according to respondents

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[8] The fraud-on-the-market theory in the securities context relies on the perfect efficiency of the securities markets, where all material information is almost instantaneously reflected in the price of the securities. *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1363 (11th Cir.), *cert. denied*, 537 U.S. 884 (2002) ("The securities market presents a wholly different context than a consumer fraud case, and neither this circuit nor the Supreme Court has extended a presumption of reliance outside of securities cases."). There is no reason to apply such a theory in civil RICO actions where there is no evidence that the quasi-markets that often underlie civil RICO actions demonstrate the perfect efficiency of the Nation's securities markets.

themselves, the point of the alleged fraud by petitioners was to dilute respondents' involvement.[9]

C. The Common Law Reliance Requirement Ensures That Civil RICO Predicated On Mail Fraud Does Not Become A Business Tort Statute For Disappointed Competitors Or Parties To Commercial Contracts

1. Civil RICO mail fraud class actions will proliferate if plaintiffs are not required to prove their own justifiable reliance

a. Numerous Fortune 500 companies, including those in the pharmaceutical industry where *amicus curiae* is a major distributor, have been targets of plaintiffs who transform ordinary fraud allegations into civil RICO actions because of the extraordinary relief of trebled damages and attorneys' fees available under civil RICO. Although businesses often prevail on the merits against individual fraud claims, or even those brought by a small group of plaintiffs, the stakes change significantly when plaintiffs attempt to certify a class under Rule 23 of the Federal Rules of Civil Procedure and seek trebled damages for every class member.

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[9] Even in the context of securities litigation, respondents' claims would be infirm. *Stoneridge Investment v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (holding that potential fraudulent statements cannot provide a basis for liability if the investing public did not rely upon them).

The threat of class-wide treble damages under civil RICO often forces legitimate businesses to forgo the possibility of defending against the claim on the merits and to, instead, settle unsubstantiated claims because of the potentially staggering liability and litigation expenses that are at risk for even the most meritless claim. This Court has recognized that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Indeed, the empirical evidence demonstrates that class actions that are certified almost always settle. *See* Thomas E. Willging & Shannon R. Wheatman, *An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation* 48 (Federal Judicial Center 2005) ("It is often said that most or even all class actions settle. Data from the current study as well as the earlier [1996] FJC study reveal an important qualification for this statement: Almost all certified class actions settle."). Moreover, in cases where there is a risk of even being associated with a class-wide accusation of federal "racketeering," there are strong reasons for out-of-court settlement of unsubstantiated claims.[10]

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[10] Rule 23(f) of the Federal Rules of Civil Procedure provides a possible avenue to interlocutory review of class certification, but courts of appeals do not grant such requests with any regularity despite their recognition that certification

(Continued on following page)

b. The question whether and to what degree a plaintiff must demonstrate justifiable reliance on a defendant's alleged fraud in order to maintain a civil RICO action predicated on mail fraud is a particularly important question in class actions.

Damages class actions certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure require "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." This requirement often precludes certification of a class action when plaintiffs must prove justifiable reliance. *See Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 220 (5th Cir.) ("A [RICO] class cannot be certified when evidence of individual reliance will be necessary."), *cert. denied*,

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"places 'insurmountable pressure' on a defendant to settle, even where the defendant has a good chance of succeeding on the merits." *Regents of Univ. of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007), *cert. denied*, No. 06-1341 (Jan. 22, 2008). Some courts of appeals, in conflict with the decisions of other circuits, have imposed stringent standards on Rule 23(f) petitions, so that economic pressure and the fact that the decision might otherwise evade review are but some of many components in the decisionmaking process. *See, e.g., Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000) (focusing on criteria other than the fact that defendant may succumb to settlement demands); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-835 (7th Cir. 1999) (same). Indeed, courts of appeals have admonished that they "intend to exercise [their] discretion judiciously" because appellate review of certification orders "are disruptive, time-consuming, and expensive." *Mowbray*, 208 F.3d at 294.

540 U.S. 819 (2003); *Patterson*, 241 F.3d at 419 (the individualized reliance findings required in a civil RICO action precluded certification); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000) ("the individual findings of reliance necessary to establish RICO liability and damages preclude not only (b)(2) certification of this class under RICO, but (b)(3) certification as well."); *Sikes*, 281 F.3d at 1364 (because RICO class members needed to demonstrate reliance, "[i]ndividual issues will therefore predominate over common issues.").

Without a requirement that a civil RICO plaintiff prove his own justifiable reliance in a case predicated on mail fraud, these class actions will proliferate and impose greater burdens on the national economy. No industry is immune from these suits, as these actions already have been indiscriminately filed against some of the nation's most important sectors, such as health care companies, health maintenance organizations, financial services companies, and ordinary businesses in jurisdictions which do not require a showing of reliance. *See, e.g.*, *Grider v. Keystone Health Plan Cent., Inc.*, No. 2001-cv-05641, 2006 U.S. Dist. LEXIS 93085 (E.D. Pa. Dec. 21, 2006) (class of thousands of doctors brought action against health maintenance organization); *In re Synthroid Mktg. Litig.*, 188 F.R.D. 295 (N.D. Ill. 1999) (nationwide class certified against pharmaceutical industry); *Johnson v. Aronson Furniture Co.*, No. 96 C 117, 1998 U.S. Dist. LEXIS 14454 (N.D. Ill. Sept. 10, 1998) (class of all retail customers); *Peterson v. H & R Block Tax Servs., Inc.*,

174 F.R.D. 78 (N.D. Ill. 1997) (statewide class against tax preparer); *Leff v. Olympic Fed. Sav. & Loan Ass'n*, No. 86 C 3026, 1987 WL 12921 (N.D. Ill. June 19, 1987) (statewide class certified against lender).

2. Even if the Court chose to depart from common law principles, any allowance for third-party reliance should preclude recovery for derivative injuries

a. Adoption of a third-party reliance exception like the one embraced by the court of appeals would represent a significant retreat from this Court's decisions in *Holmes* and *Anza*. In both those decisions, the Court held that there must be "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268; *Anza*, 126 S. Ct. at 1996.[11]

Rather than focus on whether there was a direct relation between the injury and the misrepresentation as required by that precedent, however, the court of appeals below concluded that respondents, as the "immediate and principal losers," should be capable of bringing suit. Pet. App. 7a. But being the immediate

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[11] The only court of appeals other than the court below which allows third-party reliance to satisfy Section 1964(c)'s "by reason of" requirement is the same court whose last exposition of that rule (which was relied upon heavily by the court below, *see* Pet. App. 7a) was reversed by this Court in *Anza*. *See, e.g.*, *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251 (2d Cir. 2004), *rev'd*, 126 S. Ct. 1991 (2006).

and principal loser does not necessarily make one the victim of a fraud. As common law principles dictate, the victim, *viz.*, the proper plaintiff, is the one who was induced by the wrongdoer to rely upon the misrepresentation.

Respondents' purported injury was not directly induced by the alleged fraud. Rather it was derivative of the alleged fraud that was allegedly perpetrated against the county. This is made plain by the fact that, assuming the allegations proved true, petitioners would have been subject to criminal liability for their acts against the county, not any act against respondents. *See* 18 U.S.C. § 1341; *Neder*, 527 U.S. at 25.[12]

b. Finally, if this Court were to conclude that respondents' injuries were not derivative of some injury of the county and thus were recoverable under 18 U.S.C. § 1964(c), even in the absence of their own reliance, the Court should limit the circumstances where a civil RICO plaintiff can recover in the absence of his own justifiable reliance on a misrepresentation by the defendant.

The Court should not adopt the court of appeals' "principal losers" approach, but should, at a

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[12] For that reason, the reasoning of the court below, that the county could not be "the victim of the[] fraud" because the county "did not lose even a penny," Pet. App. 5a, is irrelevant. Under the Seventh Circuit's reasoning, if the county lost a penny, respondents' injury would have been derivative.

minimum, hold that a plaintiff does not satisfy the reliance requirement merely because it suffered the most economic harm. *Holmes*, 503 U.S. at 268; *Anza*, 126 S. Ct. at 1996. Only the "immediate victim" should be permitted to recover, and a plaintiff should not be considered an immediate victim unless no other class of individuals closer to the alleged misrepresentation is legally capable (as opposed to factually capable) of suffering an injury due to the misrepresentation.[13] That plaintiff should be required to demonstrate both that the third party's reliance on the misrepresentation was justifiable and that the plaintiff's reliance on the third party was likewise justifiable. While such an approach would depart from the common law principles of fraud, it would, at least, limit recovery to circumstances where no other party can claim a more direct injury due to the purported fraud.[14]

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[13] If a third party could have been injured but escaped injury, a derivatively harmed plaintiff should not be able to recover as the "immediate victim."

[14] For example, if the county charged $1000 per bid and fewer companies signed up due to the alleged misrepresentation by petitioners, the county would be the immediate victim of the fraud and would lose some revenue, but it would not necessarily be the principal loser. In such circumstances, respondents still may have suffered greater losses, but their injury would be derivative of the county's.

CONCLUSION

For the reasons set forth above and in petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

14

3-19-08

No. 07-210

In The
Supreme Court of the United States

JOHN BRIDGES, *et al.*,

Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

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I. INTEREST OF AMICUS CURIAE[1]

The National Association of Shareholder and Consumer Attorneys (NASCAT) is a nonprofit membership organization whose member law firms litigate antitrust, commercial, civil racketeering, consumer protection, employee benefit, pension and securities fraud claims in federal and state courts. NASCAT's members represent victims of corporate abuse, schemes to defraud and white-collar criminal activity. In civil actions, NASCAT's members not only secure compensation for victims, but also deter wrongdoers, modify corporate behavior and improve access by victims to justice. NASCAT's members advocate effective enforcement of state and federal laws to prevent wrongful, fraudulent and manipulative business practices, including the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968.[2]

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[1] The parties consent to the filing of this brief. Counsel for NASCAT represent that they authored this brief and that no counsel for the parties authored this brief, in whole or in part. No other party made a monetary contribution to the preparation or submission of this brief.

[2] NASCAT has filed amicus curiae briefs in this Court in six RICO cases: *Mohawk Indus., Inc. v. Williams,* 547 U.S. 516 (2006)("enterprise"); *Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451 (2006)(proximate causation); *Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158 (2001)(liability of corporate officers); *Klehr v. A.O. Smith Corp.,* 521 U.S. 179 (1997)(statute of limitations); *Reves v. Ernst & Young,* 507 U.S. 170 (1993) (liability of professional advisors); *Holmes v. Securities Inv. Protection Corp.,* 503 U.S. 258 (1992)(proximate causation).

II. INTRODUCTION

This case concerns the scope of "scheme to defraud"[3] and "by reason of" in RICO cases based on violations of the mail fraud statute, 18 U.S.C. § 1341.[4] As the court below elucidated the issue now before this Court:

> According to defendants, the suit should be dismissed even if plaintiffs are the immediate and principal (if not the only) losers. That's so, defendants say, for two reasons: first, no false statements were made to plaintiffs; the affidavits were filed with [Cook] County. Second, plaintiffs are not in the "zone of interests" protected by the statute making mail fraud a federal crime. These

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[3] First enacted in 1872, the mail fraud statute is the progenitor of the federal fraud statutes codified in Title 18 in 1948. Congress added wire fraud, modeled on mail fraud, as a separate crime in 1952. 18 U.S.C. § 1343. Decisions under the two statutes treat key issues identically. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987). The phrase "scheme to defraud" now appears in up to 500 federal statutes, as well as 50 sections of Title 18. *Mail Fraud: Hearings on H.R. 3089 and H.R. 3050 Before the Subcomm. on Crim. Justice of the House Judiciary Comm.*, 100th Cong. 2nd Sess. 17 (1988)(Testimony of Acting Ass't Atty. Gen'l John C. Keeney). Thus, "scheme to defraud" is a crucial concept in federal fraud law, civilly and criminally. Moreover, "[these statutes] have been regularly enforced by the executive officers and the courts for more than half a century. They are now a part and parcel of our governmental fabric." *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948).

[4] In *Holmes*, 503 U.S. at 265-68, this Court held that the phrase "by reason of" in § 1964(c) of RICO meant "proximate cause," which included among its elements "directness."

come to largely the same thing, and the argument is not sound whichever way it is put.

The mail fraud statute ... defines a fraudulent ***scheme***, rather than a particular false statement, as the crime. It is illegal to obtain money by a scheme that entails fraud, if use of the mail is integral to the scheme. That's why it is unnecessary to show that the false statement was made to the victim. A scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's....

Defendants say that [plaintiffs] are not in the zone of interests protected by the mail fraud statute because they weren't taken in by any false statement. That's just a different take on the proposition that only recipients of the untruth have a remedy. When we articulated a zone-of-interests approach ... , it was to drive home the point that the ***injury*** must be direct rather than derivative.... We summed up: "firms suffering derivative injury from business torts ... must continue to rely on the common law ... rather than resorting to RICO" ... Because a zone-of-interests approach so closely overlaps the law as developed [by the Supreme Court] in *Holmes* and *Anza,* it serves no independent role. When the injury satisfies the requirements of *Holmes* and *Anza,* it cannot be

> knocked out by a zone-of-interests requirement that has no purchase in the text of either § 1341 or RICO.

Phoenix Bond & Indem. Co. v. Bridges, 477 F.3d 928, 932 (7th Cir. 2007)(emphasis in original; citations omitted).

This Court granted review limited to the question: "Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the plaintiff." *Bridge v. Phoenix Bond & Indem. Co.*, ___ U.S. ___, 128 S. Ct. 829 (2008); Brief for Petitioners ("Pet. Br.") at i. As so granted, the construction of two statutes is before this Court: Mail fraud, 18 U.S.C. § 1341, and RICO, 18 U.S.C. § 1964(c). As the court below observed, *see Phoenix Bond,* 477 F.3d at 932, the circuit courts conflict among themselves and between each other on the requirement of "convergence" in the mail fraud statute and "reliance/proximate cause" under RICO. Pet. Br. at 29-34.

NASCAT asserts that "scheme to defraud" does not require "convergence." In addition, if a private victim brings a civil suit under § 1964(c) of RICO for injury caused by mail fraud, plaintiff need only show proximate cause between the fraud and his injury, ***not*** his reliance on a false statement; thus, although reliance is ***sufficient***, it is not always ***necessary*** to show proximate cause.

III. SUMMARY OF ARGUMENT

Petitioners ask this Court to limit "scheme to defraud" in the federal fraud statutes by requiring a "convergence" between the victim to whom a perpetrator makes a misrepresentation and the victim from whom property is obtained, and to require reliance as a *per se* requirement for proximate cause under RICO.[5] Their arguments threaten to preclude ***all*** "third-party" frauds under the federal fraud statutes – criminal ***and*** civil – and sharply curtail the class of victims who may seek appropriate relief under civil RICO, reversing well-established law.

The "convergence" rule Petitioners propose, which finds no support in the text of the federal fraud statutes or RICO, little or no support in the common law, and no support in sound legal policy, finds only contradictory support in decisions of four circuits,[6]

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[5] The term "convergence" is sometimes used in the lower courts' decisions; it is only a shorthand way of referring here to limiting "scheme to defraud" to face-to-face transactions involving perpetrators and victims. *United States v. Christopher*, 142 F.3d 46, 52-54 (1st Cir. 1998), noted the issues, the use of the term and the conflicts between the circuits, before concluding: "Nothing in the mail and wire fraud statutes requires that the party deprived of money or property be the same party who is actually deceived." *Id.* at 54.

[6] *See, e.g., Mylan Labs., Inc., v. Matkari*, 7 F.3d 1130, 1137 (4th Cir. 1993); *Brown v. Cassens Transp. Co.*, 492 F.3d 640, 643-46 (6th Cir. 2007); *Vandenbroeck v. CommonPoint Mortg. Co.*, 210 F.3d 696, 701 (6th Cir. 2000); *United States v. Utz*, 886 F.2d 1148, 1151 (9th Cir. 1989)(citing *United States v. Lew*, 875 F.2d 219, 222 (9th Cir. 1989)("from the victim of the deceit"));

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while the decisions of six circuits flatly reject it, but with contradictory decisions in their jurisprudence.[7]

Johnson Enters. of Jacksonville v. FPL Group, Inc., 162 F.3d 1290, 1318 (11th Cir. 1998); *see also Monterey Plaza Hotel Ltd. P'ship v. Local 483 of the Hotel Ees. & Restaurant Ees. Union, AFL-CIO*, 215 F.3d 923, 926 (9th Cir. 2000)(RICO predicated on extortion and mail fraud dismissed under *Lew*); *see also* Pet. Br. at 29-34 (discussing cases). *But see, contra, Mid Atlantic Telecom, Inc. v. Long Distance Svcs., Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994)(RICO claim upheld based upon injury of lost customers inflicted by competitor's fraud on third parties); *cf. Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 363 (9th Cir. 2005)("Although, in some cases, reliance may be a milepost on the road to causation, ... we have ... declined to announce a black-letter rule that reliance is the only way plaintiffs can establish causation in a civil RICO claim predicated on mail or wire fraud....")(citations and internal quotations omitted), *cert. denied*, 547 U.S. 1192 (2006)(citing *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664 (9th Cir. 2004)(citing *Blackie v. Barrack*, 524 F.2d 891, 906 n.22 (9th Cir. 1975)(fraud-on-the-market presumption of reliance)).

[7] *See, e.g., Christopher*, 142 F.3d at 52-54; *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004), *rev'd on other grounds, Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006); *Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1055 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 565 (5th Cir. 2001); *Schacht v. Brown*, 711 F.2d 1343, 1356-58 (7th Cir. 1983); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325 n.4 (8th Cir. 1993); *accord, Systems Mgmt., Inc. v. Loiselle*, 303 F.3d 100, 103-04 (1st Cir. 2002)(decisions from other circuits on "convergence" rejected; defendant lost "reliance" issue but won "pattern of racketeering activity" argument; "Reliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way...."); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 991 (8th Cir. 1989)(RICO fraud theory upheld because it is broader than common law fraud); *contra, United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir. 1993)(Easterbrook,

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Petitioners' *per se* reliance requirement for proximate cause under RICO is inconsistent because misrepresentation or omission under "scheme to defraud" is not necessarily required under the mail fraud statute. Nor is its analogue required for injury caused to intended victims or competitors "by reason of" other predicate offenses under RICO (*e.g.*, murder, arson, extortion, bribery, money laundering, etc.). Simply stated, Petitioners confuse what may be sometimes ***sufficient*** for what is always ***necessary***. Reliance (or its absence) may in some situations establish (or not establish) the proximate cause nexus between a violation of RICO and the injury to the victim's business or property, but it is plainly not necessary in ***every*** situation, as the facts of this case amply establish and numerous lower court decisions unequivocally illustrate.[8]

J.)("only a scheme to obtain money or other property from the victim by fraud violates § 1341"); *Appletree Square I, Ltd. P'shp v. W.R. Grace & Co.*, 29 F.3d 1283, 1287 (8th Cir. 1994)("to establish injury to business or property 'by reason of' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts"); *Armco Indus. Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 482 (5th Cir. 1986)(distinguishing mail fraud from common law fraud; "[t]o find a violation of the federal mail fraud statute it is not necessary that the victim have detrimentally relied on the mailed misrepresentations").

[8] Commentators agree with the positions asserted by NASCAT. *See* Randy D. Gordon, *Rethinking Civil RICO: The Vexing Problem of Causation in Fraud-Based Claims Under 18 U.S.C. § 1962(c)*, 39 U.S.F. L. REV. 319 (2005); Michael Goldsmith & Evan S. Tilton, *Proximate Cause in Civil Racketeering*

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IV. ARGUMENT

A. RICO's Deliberately Broad Reach

In 1970, Congress enacted RICO, modeled on the antitrust statutes, to deal with "enterprise criminality," which consists of "***all*** types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors." *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983)(emphasis added; citations omitted). As in the antitrust statutes, in crafting RICO Congress used "a generality and adaptability [of language] comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933)(antitrust). Thus, Congress "drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms, and likely to attract a broad array of perpetrators operating in many different ways." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248-49 (1989). "The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute." *Id.* at 248. Any construction or application of RICO must take into account its deliberately broad reach.

Claims: The Misplaced Role of Victim Reliance, 59 WASH. & LEE L. REV. 83 (2002).

B. RICO's Civil Remedy and Private Enforcement

As in the antitrust statutes, RICO creates "a private enforcement mechanism that ... deters[s] violators[;] deprives them of the fruits of their illegal actions[;] and ... provide[s] ample compensation to the victims of [RICO] violations." *Blue Shield of Va. v. McCready,* 457 U.S. 465, 472 (1982)(antitrust)(citing *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 313-14 (1978)); *accord*, *Rotella v. Wood,* 528 U.S. 549, 558 (2000)(RICO authorizes "'private attorneys general' dedicated to eliminating racketeering activity....The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering.") Congress not only created civil and criminal remedies, it instructed the courts not to limit RICO's deliberately broad reach. RICO makes its principle of liberal construction a matter of ***express*** statutory language to achieve its remedial purposes. P.L. No. 91-452, 84 Stat. 923, 947 (1970); *see also PacifiCare Health Sys., Inc. v. Book,* 538 U.S. 401, 406 (2003)("Indeed, we have repeatedly acknowledged that the treble-damages provision contained in RICO itself is remedial in nature....[W]e stated that 'both RICO and the Clayton Act are designed *to* ***remedy*** economic injury by providing for the recovery of treble damages, costs, and attorney's fees'....[We have also taken] note of the 'remedial function' of RICO's treble-damages provision.")(emphasis in original; citations omitted). As the antitrust statutes are, "RICO is to be read broadly." *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473

U.S. 479, 497-98 (1985); *see also American Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 568-69 (1982)(antitrust). This Court has repeatedly recognized this principle, rejecting all attempts to limit RICO by constricted readings of its provisions.

In line with Congress' explicit mandate, RICO's causation element is simply stated. Section 1964(c) authorizes persons "injured" in their "business or property" "***by reason of***" RICO's "violation" to sue for appropriate redress, including equity relief, treble damages and attorneys' fees. 18 U.S.C. § 1964(a), (c)(emphasis added). A "violation" of RICO is committed if a "person," defined to include "individuals and entities," *id.*, § 1961(3), under appropriate circumstances, uses the mails or interstate wire facilities in the execution of "any scheme to defraud." 18 U.S.C. §§ 1341, 1343, 1961(1)(B), 1962. Thus, RICO expressly envisions that individual ***and*** corporate criminal ***and*** civil responsibility attaches to those who engage in "schemes to defraud." *Sedima,* 473 U.S. at 499 ("Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises....The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."). The statute affords to victims appropriate civil redress.

C. *Holmes* and Proximate Cause

Following RICO's antitrust parentage, in *Holmes* this Court read "by reason of" in § 1964(c) to embody traditional notions of "proximate cause" on the issue

of relative remoteness. 503 U.S. at 265-69 (citing *Associated Gen'l Contractors of Calif., Inc. v. Calif. State Counsel of Carpenters,* 459 U.S. 519, 530 (1983)(antitrust)("*AGC*")). *Holmes* applied modified antitrust remoteness factors to RICO; the modification occurred because RICO does not have an "antitrust injury" analogue. *Id.* at 259 n.15. This Court reformulated the five *AGC* antitrust factors into a three-factor standard to fit RICO: the relative "difficult[y]" of "ascertain[ing]" the plaintiff's damage "attributable to the violation" between him and other more immediate victims; the danger that recognizing the less immediate victim's claim would require the "adopt[ion of] complicated rules apportioning damages among [claimants] ... removed at different levels of injury ... to obviate the risk of multiple recoveries"; and the absence of a "need to grapple with the problems" because more immediate "victims ... [could] be counted on to vindicate the law as private attorneys general...." *Holmes*, 503 U.S. at 269-70 (citing *AGC*, 459 U.S. at 541-42). This case meets each of these standards: Damage to the victims may be mathematically "ascertained"; it is unique to the victims so no "complicated rules of apportioning" are at issue; and no other can be counted on "to vindicate the law as a private attorneys general" for these unique damages. *Id.*

Holmes did not announce a "black letter" rule that would "dictate the result in every case," but reformulated the 19th Century "remoteness" rule of

the common law (that turned on an analytical analysis of "direct or indirect" injury, that is, a formal "rule") into a 20th Century "standard." *See Holmes*, 503 U.S. at 274 n.20 ("Thus, our use of ... 'direct' should ... be understood as a reference to the proximate-cause enquiry ... informed by the ... [three factors] set out in the text. We do not necessarily use it in the same sense as courts before us have ... ").[9]

Under this Court's proximate cause jurisprudence, "labels," which substitute for reasons, merely tagging outcomes without giving the true criteria for decision (that is, "direct or indirect"), were no longer to obtain to determine "remoteness." *AGC* specifically rejected labels of "target" and "zone of interests" because the use of "labels [as a techniques of making decisions] may lead to contradictory and inconsistent results." 459 U.S. at 537 n.33.[10]

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[9] The distinction between a "rule" (drive 55 miles per hour) and a "standard" (drive reasonably) is brought out by Professor Cass Sunstein in LEGAL REASONING AND POLITICAL CONFLICTS 106-08, 110-15, 130-35 (1993). Roscoe Pound in *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482-83, 485-86 (1933), provides the classic formulation of the distinction.

[10] *See also Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577, 586 (1937)(Cardozo, J.)("labels ... are subject to the dangers that lurk in metaphors ... and must be watched ... lest they put us off our guard"); *Techt v. Hughes*, 229 N.Y. 222, 244, 128 N.E. 185, 189 (1920)(Cardozo, J.)("To determine whether ... [a treaty] has ... [a] character, it is not enough to consider its ... label. No general formula suffices. We must consult in each case the ... purpose of the specific articles [of the treaty] involved.").

Because "scheme to defraud" encompasses more than face-to-face transactions or misrepresentations or omissions (as noted in more detail below), a *per se* "convergence" rule and a universal requirement of "reliance" for proximate cause should be rejected. The only legally acceptable way to determine the issue of remoteness is to use the *Holmes* factors, as the Seventh Circuit properly did, and to use the normal tools of proximate cause. Reliance is surely ***sufficient*** to demonstrate causation in certain RICO cases, but it is hardly universally ***necessary***, as Petitioners would have it. The element of reliance was ***not*** essential to the decision of the court below; "proximate cause" was necessary and properly found.[11] Far from departing from *Holmes,* the Seventh Circuit followed this Court's teachings and the path charted by a majority of the courts.

D. Scheme to Defraud

"Scheme to defraud" is ***not*** limited to misrepresentations or fraud-by-omission; it extends, for example, to a fraud worked through bribery that need not

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[11] Courts find "proximate cause" in a variety of ways in a variety of factual situations. *See, e.g., Basic, Inc. v. Levinson,* 479 U.S. 1083, (1987)(securities fraud case recognizing fraud-on-the-market doctrine: "There is ... more than one way to demonstrate ... [a] causal connection."); *Klay v. Humana, Inc.,* 382 F.3d 1241, 1259 (11th Cir. 2004)(recognizing "circumstantial evidence" of reliance).

involve misrepresentations.[12] *See, e.g., United States v. Caldwell,* 544 F.2d 691, 695 (4th Cir. 1976)(mail fraud conviction resulting from scheme to use bank funds to bribe state officials). "Scheme to defraud" may also involve a third-party fraud, where the fraud (*e.g.*, a misrepresentation or a bribe) victimizes one entity, say, a rate-setting commission that may or may not itself suffer a property loss, where a loss is then suffered by a third person, say, a ratepayer; a gain inures to the perpetrator, say, a utility, a result that is intended. The loss and the gain need not be identical; they need only be related; and no "convergence" is required between the principal victim (the rate-setting commission) and secondary victims (ratepayers) of the fraud. Indeed, in *Holmes,* 503 U.S. at 279 n.19, this Court recognized the acceptability under proximate cause standards of this configuration of facts.

Here, a "convergence" requirement – that is, a misrepresentation made to the victim who suffers the loss (*see* note 5, *supra*) – would preclude recovery under RICO. Instead, a showing that plaintiff satisfies the usual standards of "proximate cause" ought to suffice. As in this case, third-party frauds may

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[12] *See Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941)("A scheme to get money unfairly by obtaining and the betraying the confidence of another, or by corrupting one who acts for another ... would be a scheme to defraud though no lies were told."), *overruled on other grounds, United States v. Cruz*, 478 F.2d 408, 412 n.8 (5th Cir. 1973).

involve a fraud on a governmental entity, *see, e.g., Bieter,* 987 F.2d at 1325 n.4 (RICO bribery; zoning board); *Environmental Tectonics,* 847 F.2d at 1055 (RICO bribery; foreign government), where it is not necessary to make misrepresentations or an omission and so "convergence" is not present, yet a violation of mail fraud is committed and RICO authorizes recovery. Thus, Petitioners' arguments would undermine one of RICO's ***explicit*** statutory purpose : namely, control of "public corruption."[13]

Under this Court's jurisprudence, "scheme to defraud" is broad, and it extends "to a great variety of transactions." *Fasulo v. United States*, 272 U.S. 620, 628 (1926). It "usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching." *Carpenter,* 484 U.S. at 27 (citations omitted). "Scheme to defraud" extends beyond frauds accomplished by misrepresentations or omissions, *Grin v. Shine*, 187 U.S. 181, 189 (1902)(embezzlement), and reaches beyond face-to-face transactions to include third-party frauds. *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 649-58 (1997)(misappropriation

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[13] *See Statement of Findings and Purpose*, P.L. No. 91-452, 84 Stat. 922 (1970)(Congress found that "organized crime ... drain[s] billions of dollars from America's economy ... by the illegal use of force, fraud, and ***corruption***" and Congress attacked the problem "by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and ***new remedies*** to deal with ... organized crime.")(emphasis added).

and use of confidential information to trade on securities); *accord, Carpenter*, 484 U.S. at 25-29 (insider trading viewed as misappropriation).

E. The Common Law and Federal "Fraud"

Although Petitioners urge this Court to follow "the common law," they grossly mischaracterize it. Pet. Br. at 22-24. The roots of Petitioners' errors lie in their confusing various kinds of "fraud," a term, as Dean Prosser teaches, that is "so vague that it requires definition in nearly every case." William Prosser *et al.*, LAW OF TORTS 727 (5th ed. 1984) ("Prosser"). Petitioners erroneously equate "scheme to defraud" under federal law with common law "obtaining money by false pretenses" (a crime) and common law "deceit" (a tort), each of which contain misrepresentation and reliance elements, with common law "cheat," a crime that required an "intent to defraud" and a false symbol or token, but neither misrepresentation, nor "convergence," nor face-to-face transactions, and "conspiracy to defraud" (another crime). Decisions and legal treatises of the time referred to the common law action for misrepresentation not as "fraud" but "deceit." *See, e.g.*, Joel Bishop, COMMENTARIES ON THE NON-CONTRACT LAW 132-44 (1889); Frederick Pollock, A TREATISE ON THE LAW OF TORTS 348-88 (1894). When the treatises used the term "fraud," it signified a much broader range of overreaching conduct. *See, e.g.*, Melville Bigelow, THE LAW OF FRAUD 3-4 (1877); William Anderson, A DICTIONARY OF LAW 474-78 (1889).

"Scheme to defraud" in federal fraud law stems from a careful statutory blend of common law "cheat" and "conspiracy to defraud." As explained in the student note, Courtney Chetty Genco, Note, *Whatever Happened to Durland: Mail Fraud, RICO, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333, 337-64 (1992):

> [M]ail fraud is the culmination of a long historical progression. Seen in the light of ... history, the congressional drafters purposely took elements from older offenses, while purposely leaving other elements out. The victim of larceny, embezzlement, or false pretense had to suffer a property loss. Mail fraud does not require such loss. Common-law cheat required a token ... [M]ail fraud does not require such a token....The requirements of common law cheat could be met [without a token] by a conspiracy to defraud. The congressional drafters of mail fraud deliberately substituted the concept of "scheme." The drafters also retained the element of 'intent to defraud' required by false pretenses....Accordingly, mail fraud is best seen as a modern form of common-law cheating.

Thus, cheating, without misrepresentation, omission, "convergence," or a face-to-face transaction, now properly suffices under mail fraud to establish a "scheme to defraud." *See, e.g., Murr Plumbing, Inc. v. Scherer Bros. Fin. Svcs. Co.*, 48 F.3d 1066, 1069 n.6 (8th Cir. 1995); *Formax, Inc. v. Hostert,* 841 F.2d 388,

390 (Fed. Cir. 1988). In brief, "scheme to defraud" in federal fraud statutes is ***not*** limited to the elements of common law's "false pretenses" and "deceit." Rather, it includes making promises with an intent not to perform, *United States v. Comyns*, 248 U.S. 349, 353 (1919), and embezzlement, *Grin,* 187 U.S. at 189. *See generally* Rollin M. Perkins, *et al.,* CRIMINAL LAW 292-342, 351-388 (6th ed. 1982); Clark & Marshall, LAW OF CRIMES 706-80, 795-840 (6th ed. 1958)(Melvin F. Wingersky ed.). The federal fraud statutes proscribe schemes involving false representations and schemes to defraud that do not. *See United States v. Falcone*, 934 F.2d 1528, 1539 n.28 (11th Cir. 1991). Petitioners offer no valid reasoning to overrule this settled body of law that vindicates the right of victims of different types of "schemes to defraud." Pet. Br. at 19-22.

F. Principles of Construction

The traditional elements of "scheme to defraud" may be simply set out. Defendant(s) must act with "intent to defraud." *Durland v. United States*, 161 U.S. 306, 312-14 (1896). The perpetrator must formulate a "scheme," which refers to "the overall design to defraud one or many by means of a common plan or technique." *United States v. Massey,* 48 F.3d 1560, 1566 (10th Cir. 1995). "Scheme to defraud" is "sufficiently general" to reach a broad range of illicit activity. *United States v. Maze,* 414 U.S. 395, 399 n.4 (1974)(mail fraud: "scheme to defraud" broad enough to be applicable to modern day credit card scam, despite its not being within contemplation of statute's

drafters). The perpetrator must intend to deprive another of something of value, or to gain a benefit for himself or herself by means of deprivation or gain. *Carpenter*, 484 U.S. at 27. "Intent ... make[s] an otherwise innocent act criminal, if it is a step in a plot." *Badders v. United States*, 240 U.S. 391, 394 (1916)(Holmes, J.)(mail fraud). Apart from the jurisdictional elements (*e.g.*, U.S. mails or interstate carrier), "scheme to defraud" requires nothing else. A "scheme to defraud" may be implemented through a variety of techniques including, but not limited to, material misrepresentations or omissions. A comprehensive definition of "scheme to defraud" "need not be undertaken," *Fasulo*, 272 U.S. at 628, and it has not been.[14]

Petitioners' arguments are inconsistent with not only the text and common law history (rightly understood) behind the mail fraud statute, but also modern conceptions of "fraud." Reading RICO, or any other statute (including the mail fraud statute) is a question of the "language of the statute [...] – the most reliable evidence of its intent." *United States v. Turkette*, 452 U.S. 576, 493 (1981).[15] An article written

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[14] The classic decision declining to offer such a definition of "fraud" is *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941)("The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity.").

[15] *See* Henry Friendly, BENCHMARKS 202 (1976)("(1) read the statute, (2) read the statute, (3) read the statute")(quoting Justice Frankfurter's three rules for interpreting statutes); *accord Central Bank of Denver v. First Interstate Bank of Denver*, 511

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by the co-authors of this amicus brief, G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernest & Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability,* 33 AM. CRIM. L. REV. 1345, 1460 n.441 (1996), summarizes the basic principles followed by this Court as of 1996 in construing RICO; they run straight and true. So, too, do the decisions handed down since 1996: *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999); *Beck v. Prupis*, 529 U.S. 494 (2000); *Rotella,* 528 U.S. 549; *Cedric Kushner Promotions,* 533 U.S. 158; *PacifiCare Health Sys.,* 538 U.S. 401; *Willkie v. Robbins*, ___ U.S. ___, 127 S. Ct. 2588 (2007). Petitioners offer no convincing reason to abandon these sound principles today.

The mail fraud statute says "any" fraud. "Any" means "all" not "some, but not others." *Mobil Oil Explor. & Producing Southeast, Inc. v. United Distrib. Cos.,* 498 U.S. 212, 223 (1991); *see also Central Bank,* 511 U.S. at 175 ("statutory text covers the definition

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U.S. 164, 173-75 (1994); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 533 (1947)("A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy making might wisely suggest, construction must eschew interpolation and evisceration."); Roscoe Pound, III, JURISPRUDENCE 488-90 (1959)("specious construction [of statutes] tends to bring law in to disrespect; ... subjects courts to political pressures; [and] invites an arbitrary personal element in judicial administration; [it threatens to make] laws ... worth little [and to] break down [the] legal order.").

of conduct covered"). No convincing policy justification in text, history, or contemporary events has been offered to support inserting into the text of the statute an extra-statutory-based requirement of "convergence" of the perpetrator and his victim, particularly in a society that is often characterized by complex, multiple-party frauds.

Petitioners' arguments represent an unwise effort to return to the discredited philosophy of *caveat emptor,* where courts externalized the costs of fraud from entrepreneurs to hapless victims in an effort to conserve scarce capital in a developing economy in the early 19th Century. *See generally* Morton J. Horwitz, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860, 253-66 (1977)(tracing rise of "legal formalism," which weighted law differently and narrowed damage claims to shift "political and economic power ... to merchant and entrepreneurial groups"). RICO, however, squarely stands in the tradition of congressional legislation that rejects the philosophy of *caveat emptor*. *See, e.g., Central Bank,* 511 U.S. at 171 (federal securities statutes were designed to curtail "philosophy of caveat emptor")(citations omitted); Max Radin, THE LAWFUL PURSUIT OF GAIN 54 (1931) ("[C]aveat Emptor ... is bad Latin, and from the Roman point of view, worse law."). That day is over. Petitioners' "convergence" rule is without a justifiable textual, common law historical, or contemporaneous policy grounds to support it.

Fundamentally, Petitioners misunderstand *Holmes.* Factual ("but for") cause is, of course, insufficient. 503

U.S. at 265. In each instance, an examination of other considerations is required to determine the proper extent of liability. *Id.* at 266. But no "black-letter rule ... will dictate the result in every case." *Id.* at 274 n.20 (citing *AGC,* 459 U.S. at 536). "Schemes to defraud" may involve simple, face-to-face misrepresentation or fraud-by-omission. Even so, "proximate cause" may require an analysis not only of the transaction ("How did you get into the relationship?"), but also of loss causation ("Why did you suffer the loss?"). *See, e.g., Bastian v. Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir. 1990)(RICO; while transaction causation and loss causation may merge, each must be shown; fraud that induced entry into oil and gas partnership established transaction causation, but where fraud is unrelated to decline in market value, loss causation was not established: "If the plaintiffs would have lost their shirts in the oil and gas business regardless of the defendants' violations of RICO, they have incurred no loss for which RICO provides a remedy."). Thus, proof of "convergence" and reliance may or may not show transaction and loss causation. *Compare Metromedia Co. v. Fugazy,* 983 F.2d 350, 368 (2d Cir. 1992)(RICO; reliance in face-to-face misrepresentation fraud shows proximate cause between fraud and injury) *with Ideal Dairy Farms, Inc. v. John Labatt, Ltd.,* 90 F.3d 737, 746-47 (3d Cir. 1996)(RICO; where plaintiff knew of overcharges, no proximate cause between face-to-face misrepresentation fraud and injury).

Antitrust "proximate cause" is also instructive in construing RICO's proximate cause requirement because the federal antitrust laws were RICO's model.[16] When this Court, in *AGC*, took up "proximate cause" in antitrust litigation, it rejected the use of "labels" to decide remoteness questions. *See AGC*, 459 U.S. at 528-35 & n.33 (discussing "directness," "zone of interests" and "target"). Instead, this Court instructed the lower courts to "analyze each situation in light of the factors" identified in its opinion. *Id.* RICO and the federal antitrust laws share many concepts. *See, e.g., Environmental Tectonics*, 847 F.2d at 1067 (recovery for antitrust and RICO claims upheld in action alleging bribery by bidder of foreign government). Apart from special antitrust requirements that are not applicable to RICO, "proximate cause," is the same under RICO and antitrust. *Holmes*, 503 U.S. at 269-70. Yet third-party recovery without "convergence" or "reliance" clearly meets the test of proximate cause in antitrust litigation.[17] Thus, Petitioners'

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[16] RICO's legislative history is traced in G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249-280 (1982)("Blakey, *RICO Civil Fraud Action*").

[17] *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495-96 (1988)(manufacturer of plastic conduit properly permitted to sue manufacturer of steel conduit that improperly influenced trade association, which, in turn, promulgated safety code that contained false product safety information about plastic conduit, which, in turn, influenced market participants either not to use plastic conduit or to disapprove its use by others).

per se approach for "convergence" and "reliance" is unsupportable in light of the text of RICO and its antitrust parentage.

G. Reliance Alone

Petitioners confuse "sufficient" with "necessary." Respondents have shown a ***sufficient*** connection between Petitioner's alleged violations of RICO and its injuries using traditional proximate cause tools ***without*** having to show reliance by anyone. In fact, Cook County, Illinois, relied upon the false statement by Petitioners of no third-party interest in permitting various bidders, including Petitioners, to participate in the tax lien pool.[18] In fact and in law, Respondents' injuries, easily calculated, to its business and property followed, as sunrise follows sunset,

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[18] Here, too, this Court cannot take guidance from "analogous express right of action" in Title 18 that requires reliance. *Central Bank,* 511 U.S. at 178 (citations omitted). When Congress wants an element of reliance (or, for that matter, "convergence") to play a role in an express claim for relief under Title 18, it has "little trouble in doing so." *Id.* (citations omitted). *See, e.g.,* 18 U.S.C. §§ 2510(d), 2707(e), 3124(e), providing for good faith reliance on judicial process as defense to civil liability. "Reliance" nowhere else appears in Title 18. Nevertheless, should this Court decide to imply a reliance element, it should be "justifiable" reliance, rather than "reasonable" reliance. *See Field v. Mans,* 516 U.S. 59, 70-77 (1995)(proper test of reliance in fraud case is not "reasonable" reliance, it is "justifiable" reliance); *Gordon & Co. v. Ross,* 84 F.3d 542, 546 (2d Cir. 1996) (same); RESTATEMENT (SECOND) OF TORTS § 525 (1976)("justifiable reliance upon the misrepresentation"). Negligence ought not offset an intentional tort.

when Petitioners intentionally made the illegal bids in the confined lien pool, knowing and intending the necessary consequence of their illegal bid to dilute the proper share of the other participants in the pool that played by the rules. Respondents should be able to convince a jury, under these well-pled facts, of the proximate relation under RICO between the illegal bids of Petitioners and the financial losses suffered by Respondents.[19]

H. Remoteness and RICO

Remoteness is another matter, an issue of weighing factors in choosing between victims to select the one in the "best position" to enforce ***federal*** law, not state law. *Holmes*, 503 U.S. at 269; *AGC*, 459 U.S. at 541-45; *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 214 (1990)(antitrust); *California v. ARC America Corp.*, 490 U.S. 93, 102 n.6 (1989)("*ARC*")(antitrust); *see Sports Racing Svcs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 889 n.15 (10th Cir. 1997) (antitrust)("best position to identify ... [a violation]

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[19] An argument for reliance as the ***sole*** means to show proximate cause under RICO would not be seriously entertained had Petitioners burned down Respondent's store or shot its president. Remoteness would, of course, not be an issue, but why should "reliance" either be raised? *See Jerry Kubecka, Inc. v. Avellino*, 898 F. Supp. 963, 969 (E.D.N.Y. 1995)(corporation, but not personal estates, permitted to sue under RICO for economic injury to its business and property flowing from mob hit on its president by hitmen connected to rival garbage collection companies; reliance neither raised nor considered).

and the most incentive to bring an action"). No plaintiff's claim should be (as argued by Petitioners) denied under a "remoteness" analysis when the denial is "likely to leave a significant ... violation [of federal law] undetected or unremedied." *AGC*, 459 U.S. at 542. Petitioners complain about the overlap between RICO and state law and crowded court dockets,[20] but the issue of court dockets may not properly play a role in construing a statute. *Reiter v. Sonotone Corp.* 442 U.S. 330, 344-45 (1979).[21]

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[20] RICO's legislative history makes clear that "Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud." Blakey, *RICO Civil Fraud Action*, 58 NOTRE DAME L. REV. at 280.

[21] Writing for a unanimous Court, Chief Justice Burger made the following observations about the "crowded docket" argument in the antitrust context, but his comments are equally applicable to RICO today:

> Respondents also argue that allowing class actions to be brought by retail consumers like the petitioner here will add a significant burden to the already crowded dockets of the federal courts. That may well be true but cannot be a controlling consideration here. We must take the statute as we find it. Congress created the treble-damages remedy of § 4 [of the Clayton Act] precisely for the purpose of encouraging ***private*** challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations. Indeed, nearly 20 times as many private antitrust actions are currently pending in the federal courts as actions filed by the Department of Justice....

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Nevertheless, "undetected and unremedied" is an issue of federal law. *See ARC*, 490 U.S. at 104-05 (antitrust; duplication under federal and state law permissible); *Turkette*, 452 U.S. at 587 n.9; P.L. No. 91-452, 84 Stat. 923, 947 (1970)(duplication under RICO and state law preserved). Members of Congress raised similar questions in the floor debates on RICO. *See Turkette,* 452 U.S. at 586-87 ("In the face of these objections, Congress nonetheless proceeded to enact the measure."); Blakey, *RICO Civil Fraud Action,* 58 NOTRE DAME L. REV. at 249-80 (tracing legislative history). Petitioners should take their complaints about RICO to Congress, not this Court.

> Finally, respondents argue that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers in any event. These are not unimportant considerations, but they are policy considerations more properly addressed to Congress than to this Court. However accurate respondents' arguments may prove to be – and they are not without substance – they cannot govern our reading of the plain language in § 4 [of the Clayton Act]....
>
> Recognition of the plain meaning of the statutory language "business or property" need not result in administrative chaos, class-action harassment, or "windfall" settlements if the district courts exercise sound discretion and use the tools available. (italics in original; citations and text omitted.)

Reiter, 442 U.S. at 344-45.

I. Competitive Injury

When a third-party fraud results in a competitive injury, no one else ***can*** sue for that injury under RICO. *See, e.g., Procter & Gamble*, 242 F.3d at 565. But competitive injury is clearly compensable under RICO. *Sedima*, 473 U.S. at 497 & n.15 ("Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts. Such damages include, but are not limited to, ... competitive injury...."). The majority and minority opinions in *Sedima* were unanimous on the recovery of competitive injuries. Petitioners do not mention this aspect of *Sedima* in their arguments. In short, no suit under RICO brought by Cook County – which was not injured in its business or property by Petitioners' scheme – can recover the separate losses of the pool participants that played by the rules.

J. Intentional Torts

Traditionally, foreseeability plays a diminished role in "proximate cause" determinations where the "tort" is, as here, intentional. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 435 (1976). RICO is a "tort," *Mid Atlantic Telecom,* 18 F.3d at 263-64, and its predicate offenses require a state of mind, met here by a showing of "intentional" conduct under circumstances where the perpetrator is certain of the consequences of its behavior on the other pool players; in fact, the consequences were its intent. Thus, causation for damages under RICO properly extends further than

negligent torts. *See, e.g., Roma Constr. Co. v. aRusso*, 96 F.3d 566, 576 (1st Cir. 1996)(RICO; succumbing to governmental extortion by victim does not break causation), *reversing,* 906 F. Supp. 78 (D.R.I. 1995)(holding that person who pays extortionist is cause of his own injury). Here, the tort is both intentional and specifically designed to impact on Petitioners' competitor. No provision of the RESTATEMENT, rightly understood, counsels against Respondents having standing to sue under a proximate cause analysis.

K. *Peek* and Petitioners

Petitioners' *per se* preclusion of recovery for injury suffered by a third party whose injury was an objective of the scheme, where the fraud is directed at another party, particularly a government agency, is a misguided effort to import a discredited 19th Century *laissez faire* limitation in English law on civil "deceit" into the modern American statutory law of "scheme to defraud" and RICO, an express claim for relief. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748 (1975)("[I]f Congress ... legislate[s] the elements of a private cause of action for damages, the duty of the Judicial Branch ... [is] to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.") Petitioners' argument implicitly adopts the wholly discredited common law limitation imposed in

Peek v. Gurney, L.R., 6 Eng. & In. App. 377 (1873). Lord Cairns, reflecting the narrow views of his day, held that a speaker who makes a misrepresentation is civilly liable only to the one whom he "desired" to influence (the principal listener) by the representation in the fashion that occasioned the injury; absent extraordinary circumstances, third parties were not entitled to recover. *Peek* is ably criticized in W. Page Keeton, *The Ambit of Responsibility for Fraud: Representator's Liability*, 17 TEX. L. REV. 1 (1938).

Any *Peek*-type limitation imported from English law for federal fraud statutes or RICO finds no traction in the plain text of those statutes – that, as noted above, affords "any person" the right to sue, by the common law history of the provisions (rightly understood) or by any justifiable grounds of public policy in a modern society. Limitations on civil "deceit" "plainly have no place" in establishing a "violation" of a "scheme to defraud." *Neder v. United States,* 527 U.S. 1, 23 (1999). Nor should they affect civil liability. *Am. Society of Mech. Eng'rs*, 456 U.S. at 568-69 (antitrust; "Victorian" common law limitations inappropriate on private enforcement of antitrust statutes).

In fact, American common law decisions abound that are inconsistent with the British court's decision in *Peek*. *See, e.g., Bohannon v. Wachovia Bk. & Trust Co.*, 210 N.C. 679, 683, 188 S.E. 390, 394 (1936) (testator deceived into disinheriting plaintiff; plaintiff had claim for relief against perpetrator); *accord* RESTATEMENT (SECOND) OF TORTS § 774B (1976); *Mitchell v. Langley*, 143 Ga. 827, 831, 85 S.E. 1050,

1051 (1915)(holder of life insurance policy defrauded into switching beneficiary; beneficiary has claim for relief against perpetrator). Based on his review of the American common law cases, J.G. Sutherland observed in his treatise, LAW OF DAMAGES (1916), that "where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote ... ***unless the wrongful conduct is willful for that purpose***." *Id.* at 55 (emphasis added). Respondents do not urge that the factor of intent alone suffices for proximate cause, because it does not. *See Blue Shield of Va.*, 457 U.S. at 479 ("The availability of the [private antitrust] remedy to some person who claims its benefit is not a question of the specific intent of the conspirators.") Nevertheless, this Court ought not to ignore entirely the role that intent plays, if properly placed in the context of the *Holmes* factors. Thus, common law history does not support Petitioners' arguments.

L. The "Floodgates" Myth

Finally, Petitioners posit the thoroughly refuted opening the "litigation floodgates" myth of civil RICO litigation. Pet. Br. at 37-40. It does not stand the light cast by data, which is singularly missing from Petitioners' brief. Between 1960 and 1980, of the 22,585 civil and criminal cases brought under the federal antitrust laws by the government or private parties, private plaintiffs instituted 84 percent. *U.S. Dep't of Justice,* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 431 (1981). No one seriously suggests that private

antitrust litigation is at floodgate proportions. Since RICO's enactment in 1970, the number of criminal to civil RICO suits has run at approximately the same ratio. G. Robert Blakey & Thomas Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God – Is this the End of RICO?,"* 43 VAND. L. REV. 851, 1020 (1990). These authors refuted the "litigation floodgates" myth, *see id.* at 869-73, while more recent data confirms their analysis.

According to the Administrative Office, during 2006 criminal case filings totaled 66,365 cases, of which just 28 (0.042% of the total) were criminal RICO. In the same year, civil filings totaled 259,541 cases, of which 687 (0.26% of the total) were civil RICO cases. U.S. Admin. Office of Courts, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS, Tables C-2 (civil cases) and D-2 (criminal cases), at 162-64, 229-31 (March 31, 2006), available at http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf (last visited Mar. 12, 2008).[22] Thus, empirical data expose as fanciful the urban legend that civil RICO cases overburden federal circuit or district courts.

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[22] By way of comparison, the 986 private civil antitrust actions filed in 2006 far outnumbered the 687 private civil RICO actions filed in the same year. *Id.*, Table C-2 at 163-64.

M. RICO's Role

RICO is broad – not, as some argue, ambiguous. *Sedima*, 473 U.S. at 499 (RICO "demonstrate[s not] ambiguity[, but] breadth")(citation omitted); *Russello v. United States*, 464 U.S. 16, 21-22 (1983)("Congress selected ... ['interest'] apparently because it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth. Among these are 'enterprise' ... ; 'racketeering activity' ... ; and 'participate'."). Nor may a court, in any event, properly use a fear of "excessive" litigation to curtail congressional express claims for relief. *Reiter*, 442 U.S. at 344 (antitrust). Fears that a decision of this Court will open proverbial "floodgates" of RICO litigation, even if valid, "are policy considerations more properly addressed to Congress than to this Court." *Id.* at 345. But apart from the raw numbers, determining the volume of cases is pointless until the litigation is itself characterized because, as this Court recognizes, "[t]hat our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 643 (1985).

RICO's effectiveness – in both criminal and civil cases – as one legal guarantor of the integrity of the nation's marketplace, an issue sadly in the headlines every day in the context of corporate fraud, is crucial. The litany of major company names facing fraud charges in the news is dizzying. *See, e.g.*, Lynnley

Browning, *Prosecutor Say Ex-A.I.G. Executives Created A Fraud*, N.Y. TIMES, Feb. 12, 2008, at C2 (reporting prosecution of former executives of American International Group, major insurance company, for manipulation of its financial statements); Tim Arango, *Black Given Prison Term Over Fraud*, N.Y. TIMES, Dec. 10, 2007 at C1 (reporting that Conrad M. Black, former executive of Hollinger International, world's third-largest newspaper empire, sentenced to more than six years imprisonment); *The Economist*, June 28, 2003 (Special Ed.) at 7 (reporting major corporations, including Enron, WorldCom, Tyco, Adelphia, HealthSouth, ImClone and Global Crossing, under investigation for fraud)("[T]he basic task is to insure that existing laws are vigorously enforced and that any loopholes in them are closed.").[23] "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." Carl Kaysen *et al.*, ANTITRUST POLICY 17 (1959); *accord, American Column & Lumber Co. v.*

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[23] While headlines about corporate fraud tell one story, other headlines tell the story of dwindling federal resources to fight fraud or other pressing matters in light of the terrorist attacks on September 11, 2001. *FBI Shift Crimps White-Collar Crime Probes; With more agents moved to anti-terrorism duty, corporate fraud cases are routinely put on hold, prosecutors say.*, L.A. TIMES, Aug. 13, 2004, at C1. The need for private actions as a supplement to federal law enforcement is manifest. Respondents here, of course, do not offer civil RICO as a panacea for the issues presented by the current epidemic of corporate fraud, but ask only is it wise to restrict it in the light of contemporaneous events.

United States, 257 U.S. 377, 414 (1921)(Brandeis, J., dissenting)("Restraint may be exerted through force or fraud or agreement"). Antitrust focuses on the third; federal "scheme to defraud" statutes focus on the second; RICO focuses on the first and second. Together, they seek a national market place characterized by integrity, both fiscal and physical.

If the federal fraud statutes and RICO are to be limited, as attempted here by Petitioners, that reform ought, if at all, to come from Congress. *H.J. Inc.*, 492 U.S. at 249. Congress still sits and it can amend RICO if it sees fit. *See, e.g.*, Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 107, *amending*, 18 U.S.C. § 1964(c)(conduct actionable as securities fraud may not be grounds for civil recovery under RICO).

After ample time, and in full possession of the facts, Congress has ***not*** enacted ***general*** limitations on mail fraud or on RICO's civil enforcement of its "scheme to defraud" provisions. Indeed, Congress expanded them after this Court's restrictive decision in *McNally*, 483 U.S. 350, by enacting 18 U.S.C. § 1346 ("honest services" fraud restored to mail and wire fraud statutes). Absent constitutional considerations, which are not present here, that ought to be the end of the matter judicially. *Turkette*, 452 U.S. at 587 ("There is no argument that Congress acted beyond its power.... That being the case, the courts are without authority to restrict the application of ... [RICO]"). Justice Cardozo put it well in *Techt*, 229 N.Y. at 228-29: "[A court's] duty is done when ... [it]

enforce[s] the law as it is written." NASCAT seeks no more than the enforcement of the statutes as written.

V. CONCLUSION

For these reasons, NASCAT respectfully urges this Court to reject the arguments of Petitioners and affirm the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

JOHN BRIDGE, *et al.*,

Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the Plaintiff.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation[1] is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

To that end, WLF has appeared before this Court as well as other federal and State courts to argue against overly expansive theories of tort liability and excessive punitive damages. Of particular relevance to this case, WLF has appeared in this Court to argue against an overly expansive interpretation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq*. *See, e.g., Beck v. Prupis*, 529 U.S. 494 (2000); *Rotella v. Wood*, 528 U.S. 549 (2000); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). WLF also filed a brief in *Bank of China v. NBM L.L.C.*, No. 03-1559, a case that raised issues substantially similar to the issues in this case but that was settled by the parties before the Court rendered a decision.

WLF is concerned that the reflexive invocation of RICO by civil litigants engaged in otherwise garden-

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief; WLF has lodged letters of consent with the clerk.

variety commercial disputes does violence to the original purpose of RICO and unnecessarily burdens our federal judicial system. While Congress adopted RICO as a tool to fight organized crime, civil RICO is now all too often invoked in "everyday fraud cases brought against respected and legitimate enterprises." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985). While such use of RICO is at times a reflection of the statute's expansive language, WLF is concerned that much of the time RICO is invoked inappropriately by opportunistic plaintiffs seeking to force the settlement of doubtful claims by defendants unable to cope with the threat of treble damages and the unfavorable publicity that arises anytime one is labeled a "racketeer."

WLF is filing this brief because of its interest in promoting the welfare of the business community and the public at large; it has no other interest, financial or other, in the outcome of this lawsuit.

STATEMENT OF THE CASE

The parties to this proceeding are all regular bidders at auctions conducted annually by the Treasurer's Office in Cook County, Illinois, during which the County auctions off tax liens on real property whose owners have failed to pay property tax. Respondents Phoenix Bond & Indemnity Co., *et al.* (collectively, "Phoenix Bond"), contend that Petitioners John Bridge, *et al.* (collectively, "Bridge"), made fraudulent statements to the Treasurer's Office in connection with the auctions and that the Treasurer's Office relied on those statements in allowing Bridge to submit bids. Phoenix Bond contends that Cook County was not injured by Bridge's alleged fraud: it received

the same proceeds from the auctions that it would have received even in the absence of fraud. However, Phoenix Bond alleges that it was injured by the fraud; it contends that the Treasurer's Office declared Phoenix Bond the winning bidder on fewer tax liens than would have been the case had Bridge not engaged in fraud and had the Treasurer's Office not relied on that fraud. Phoenix Bond does not contend that it acted in reliance on the allegedly fraudulent statements, or that it even heard the statements.

Phoenix Bond filed this action in July 2005, alleging *inter alia* that Bridge had participated in the affairs of an enterprise through a pattern of "racketeering activity," and had conspired to do so, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) and (d). The "racketeering activity" alleged by Phoenix Bond was mail fraud, 18 U.S.C. § 1341; the complaint alleged that the defendants used the U.S. Mail as part of their scheme to defraud the Treasurer's Office regarding the nature of their auction bids.

The district court granted Bridge's motion to dismiss in December 2005. Pet. App. 9a-20a. The court held that Phoenix Bond lacked prudential standing to bring its RICO claim, reasoning that the plaintiffs were "not within the 'zone of interests' that the RICO statute protects" because they were not the recipients of any of Bridge's fraudulent communications. *Id.* 18a.

The Seventh Circuit reversed and remanded in February 2007. *Id.* 1a-8a. Without directly addressing prudential standing, it held that Phoenix Bond had established its standing by adequately alleging injury-in-

fact (a reduction in the number of tax liens it was awarded) that was directly traceable to Bridge's alleged misconduct. *Id.* 3a-4a. It went on to hold that the complaint had adequately alleged that Bridge's fraud was the "proximate cause" of Phoenix Bond's injuries. While conceding that the federal appeals courts are split on the issue, it held that proximate cause can be established in a RICO action based on mail or wire fraud even when the defendant's misleading statements are neither made to nor relied upon by the plaintiff, so long as the plaintiff's "injury is not derivative of someone else's." *Id.* 7a.

SUMMARY OF ARGUMENT

RICO creates criminal penalties for a broad range of conduct and also authorizes any person injured in his business or property "by reason of" a violation of RICO's criminal provisions to bring a civil suit to recover treble damages plus the costs of the suit. 18 U.S.C. § 1964(c). The Court held in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), that § 1964(c)'s "by reason of" language imposes a "proximate cause" requirement on civil RICO claimants. It is not enough for a claimant to demonstrate that the defendant's actions were simply a but-for cause of his injury.

When the claimant alleges that the defendant's predicate actions consist of misrepresentations in violation of the federal mail fraud statute, it is a straightforward application of *Holmes*'s proximate cause requirement to preclude civil RICO recovery if, as here, the claimant did not rely on those misrepresentations. Phoenix Bond asserts that its injuries were a virtually

certain consequence of Bridge's misrepresentations, but that assertion does little more than demonstrate but-for causation. In this context, proximate cause requires a close relationship between the parties of the sort that is wholly absent in this case.

Holmes held that because § 1964(c)'s "by reason of" language is taken from antitrust statutes, courts should look to those statutes for assistance in discerning Congress's intent in adopting that language. *Holmes*, 503 U.S. at 267-268. The Court has routinely interpreted the Clayton Act and the Sherman Act as incorporating a strict proximate causation requirement, such that "[t]he general tendency of the law, in regards to damages at least, is not to go beyond the first step." *Assoc. General Contractors of Calif., Inc. v. Carpenters*, 503 U.S. 258, 271 (1992) (quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)). In the antitrust context, the "first step" limitation has generally been understood to mean limiting damage awards to those having a direct relationship with the defendant. Applying that limitation to this case is fatal to Phoenix Bond's claim. In the absence of any assertion that it had a direct relationship with Bridge – either by virtue of having relied on Bridge's misrepresentations or of an allegation that it was Bridge's intended victim – Phoenix Bond cannot meet that strict proximate cause requirement.

Phoenix Bond asserts that it has adequately alleged proximate cause by alleging facts demonstrating that Bridge's misrepresentations are the only possible cause of its injuries. But demonstrating a strong but-for causal relationship in a specific case has never been deemed sufficient to establish proximate cause. Indeed,

in the antitrust context, the Court has strongly cautioned against creating exceptions to "first step" proximate cause rules based on the facts of particular cases. The Court has explained that creating such exceptions would undermine the basic rule by encouraging repeated attempts by plaintiffs to invoke the exceptions.

The Court should be particularly wary of recognizing such exceptions when, as here, the RICO claim is being asserted by a business competitor of the defendant. It will not take much encouragement from the Court to induce large numbers of disappointed contract bidders to accuse successful bidders of RICO "racketeering." It would not be very difficult, for example, to find fault with the manner in which a successful bidder touted his business acumen. Bridge is accused of having engaged in business activity that would generally be deemed pro-competitive – because aggressive bidding in a public auction almost always inures to the benefit of the party conducting the auction. When employed by disappointed bidders, RICO is too heavy-handed a tool to effectively ferret out the few instances where (as Phoenix Bond alleges to be true here) aggressive bidding is actually harming the auction. The Cook County Treasurer's Office created the bidding rules at issue here and thus is better situated than Phoenix Bond to decide whether Bridge's actions have harmed the auctions and merit initiation of sanction proceedings.

A reliance requirement in cases of this sort is particularly important in light of the well-recognized tendency of RICO to turn garden-variety tort suits into treble-damage federal racketeering claims. The steady

stream of RICO claims against legitimate businesses is likely to become a flood if the Court eliminates the reliance requirement in RICO fraud cases – a requirement that has been recognized to at least some extent by every federal appeals court that has addressed the issue. This Court has correctly recognized that it is not the role of the courts to re-write RICO, that any deficiencies in the statute should be corrected by Congress instead of the courts. But the reliance requirement is not a judicial invention; it is deeply rooted in the concept of proximate cause mandated by Congress when it adopted RICO. In light of the significant commercial disruptions likely to arise from elimination of the reliance requirement, the Court should be particularly hesitant to adopt the Phoenix Bond's reading of RICO, a reading most certainly not self-evidently required by the statutory language.

ARGUMENT

I. A RELIANCE REQUIREMENT IN MAIL FRAUD CASES OF THIS TYPE IS A STRAIGHT-FORWARD APPLICATION OF *HOLMES*'S PROXIMATE CAUSE REQUIREMENT

This Court held more than 15 years ago that a civil RICO plaintiff bears the burden of demonstrating that the defendant's racketeering activity proximately caused the injury of which he complains. The Seventh Circuit correctly concluded that where the alleged racketeering activity consists of fraudulent misrepresentations that result in injury, reliance on those misrepresentation is a required element of the

claim. The appeals court erred, however, when it concluded that the plaintiff can establish that the defendant proximately caused his injuries based on a demonstration that *someone else* relied on those misrepresentations.

The statute creating a private right of action for violations of RICO, 18 U.S.C. § 1964(c), provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

In *Holmes*, the Court considered the meaning of § 1964(c)'s "by reason of" language. The Court conceded that the language could be read to mean that a plaintiff demonstrates injury, and therefore may recover damages, "simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injuries." *Holmes*, 503 U.S. at 265. But the Court rejected that interpretation, based largely on its view that it was "very unlikel[y]" that Congress meant to permit such broad-based recovery. *Id.* Instead, the Court concluded that Congress intended to incorporate traditional notions of proximate cause into civil RICO claims. *Id.* at 268.

In reaching that conclusion, the Court looked to the Clayton Act for guidance. *Id.* at 267. The Court observed that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the

Clayton Act, which reads in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

15 U.S.C. § 15. Noting that it had previously ruled that § 4 of the Clayton Act incorporated a proximate cause requirement, the Court concluded that the reasoning of its prior ruling "applie[d] just as readily to § 1964(c). [Congress] used the same words, and we can only assume it intended them to have the same meaning that courts had already given them." *Holmes* 503 U.S. at 268.

The Court stated that "'the infinite variety of claims that may arise make it virtually impossible to announce a blackletter rule that will dictate the result in every case'" regarding whether an injury was "proximately caused" by the defendant's actions. *Id.* at 272 n.20 (quoting *Assoc. General Contractors*, 459 U.S. at 536). Nonetheless, the Court provided some general guidelines for use in making that determination:

> Here we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient." W. Keeton, D. Dobbs, R.

Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984).

Id. at 268. The Court then proceeded to look to common law for guidance regarding the proximate cause question it faced (whether the defendant's stock manipulation could be deemed the proximate cause of the plaintiff's injury). *Id.* (noting the "many shapes [the] concept [of proximate cause] took at *common law*") (emphasis added).[2]

Any resort to the common law for guidance is fatal to Phoenix Bond's position. There can be no serious dispute that a plaintiff seeking to recover for a fraudulent misrepresentation at common law has long been required to demonstrate his or her reasonable reliance on the misrepresentation. *See, e.g., Field v. Manns*, 516 U.S. 59, 70 (1995) (at common law, "fraudulent misrepresentation" requires "both actual and justifiable reliance"). Given the teaching of *Holmes* and *Beck* that the contours of "proximate cause" in RICO cases involving allegations of fraudulent misrepresentations should be determined by reference to the common law (because Congress is likely to have legislated with those common-law notions of proximate cause in mind), § 1964(c) bars recovery unless the plaintiff can demonstrate reliance on the

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[2] In *Beck v. Prupis*, 529 U.S. 494, 500 (2000), the Court similarly looked to common law principles for assistance in discerning congressional intent with respect to the meaning of RICO: "To determine what it means to be 'injured . . . by reason of' a 'conspiracy,' we turn to the well-established common law of civil conspiracy." *Beck*, 529 U.S. at 500 (quoting 18 U.S.C. § 1962(d)).

misrepresentation.

Although reliance is not an issue in antitrust litigation, the Court has adopted analogous limitations on the availability of damages to antitrust plaintiffs. In applying proximate cause standards to such plaintiffs, the Court has required them to demonstrate a direct relationship with the defendant, noting that "[t]he general tendency of the law, in regards to damages at least, is not to go beyond the first step." *Assoc. General Contractors of Calif., Inc.*, 503 U.S. at 271. Thus, for example, in price fixing cases the court has limited recovery of damages to those who purchased directly from one of the conspirators. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Recovery is denied to indirect purchasers, no matter how strong their showing that the conspiracy caused them to pay enhanced prices for their goods. *Id.* at 737-38.

The Seventh Circuit rejected Bridge's analogous claim that a plaintiff, in order to establish proximate cause in a RICO mail fraud action, must demonstrate that the plaintiff himself (and not some third party) relied on the defendant's fraudulent misstatements. The appeals court held, "A scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO *if the injury is not derivative of someone else's*." Pet. App. 7a (emphasis added). A principal difficulty with the appeals court's standard is that it provides little or no guidance regarding what constitutes a noncompensible "derivative" injury. Presumably, the court had in mind the types of claims at issue in *Holmes*: the plaintiff's injury arose solely because the plaintiff was required to cover the debts of others driven into insolvency by their

cause requirement mandated by Congress is the rule adopted by a majority of federal appeals courts: in order to establish proximate cause in a RICO action based on mail or wire fraud, a plaintiff must demonstrate that (s)he relied on the defendant's misrepresentations and was injured thereby.[3] That rule also has the advantage of clarity so obviously lacking in the Seventh Circuit's "derivative" injury standard.

Although Phoenix Bond has no direct relationship with Bridge, it makes out a quite plausible case that, if its allegations are proven accurate at trial, its injuries were caused by Bridge's bidding scheme. But in an analogous antitrust context, the Court has refused to grant exceptions to its *Illinois Brick* rule simply because the plaintiff has demonstrated that his case avoids the evidentiary difficulties that caused the Court to adopt the rule in the first instance. In *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), gas pipeline companies were alleged to have kept wholesale natural gas prices artificially high through a price fixing scheme. A public utility that purchased gas from the pipeline companies filed a suit seeking damages under § 4 of the Clayton Act, 15 U.S.C. § 15. The States of Kansas and Missouri tried to join the suit on behalf of consumers in their States, on the theory that consumers – not the public utility – were the real injured parties, because the public utility had simply passed along all costs to the

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[3] WLF also submits that proximate cause can be demonstrated if the RICO plaintiff was directly targeted for injury by the plaintiff. For example, if A embezzles money from B by means of wire fraud, B can establish proximate cause in a RICO action even though, as a victim of embezzlement, he obviously did not *rely* on the embezzlers' actions.

consumers.

In rejecting the States' effort to carve out an exception to the *Illinois Brick* rule, the Court did not contest the States' contention that all the reasons for adopting the *Illinois Brick* rule (*e.g.*, avoiding difficulties regarding apportionment of damages among multiple claimants, the risk of multiple recoveries, and the risk of diminution of incentives for private enforcement) were inapplicable to their case. Indeed, the States asserted that by using public utility records, they could "prove the exact injury to the residential customers." 497 U.S. at 208. The Court nonetheless held that the purposes of the rule against awarding antitrust damages to indirect purchasers were best served by making no exceptions to the rule: "[E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." *Utilicorp United*, 497 U.S. at 217. The Court explained, "The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Id.* at 216.

Similarly, there is no reason to exempt Phoenix Bond from normally applicable proximate cause requirements simply because, if its allegations turn out to be credible, it may have an easier time establishing but-for causation than would normally be the case in suits of this type.[4] As *Utilicorp United* cogently

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[4] The unique bidding system allegedly employed by the Treasurer's Office means that one can accurately predict how tax liens will be allocated among bidders based on an examination of all bids, with allocation allegedly based on the number of bidders

the day-to-day workings of the Cook County Treasurer's Office and thus has no independent basis for evaluating whether Petitioners have employed a bidding system that is inconsistent with the best interests of the county's taxpayers. Nonetheless, it is worth pausing to ponder two salient facts: (1) the parties to this action are long-time competitors; and (2) while it may be true that Bridge's bidding system injured Phoenix Bond, the activities of which Bridge stands accused – submitting as many bids as possible (too many, by Phoenix Bond's calculations) – would be viewed by most neutral observers as a pro-competitive activity. That is so because, in general, the more bids Cook County receives, the more likely it is to maximize revenues from tax lien sales.

Justice Breyer has warned against allowing civil RICO suits to stifle competition. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, ___, 126 S. Ct. 1991, 2008-2013 (2006) (Breyer, J., concurring in part and dissenting in part). He asserts that RICO "does not cover claims of injury by one competitor where the legitimate pro-competitive activity of another competitor immediately causes that injury." *Id.* at 2008-09. It remains to be seen whether Bridge's bidding system can properly be characterized as pro-competitive. But given at least a possibility that suits of this sort tend to stifle pro-competitive activity, at the very least the Court should insist that suits of this sort not proceed past the pleadings stage unless the plaintiff can establish proximate cause.

Dismissing Phoenix Bond's RICO claims will not create a gap in the law, nor will it leave Phoenix Bond without remedies. It is free if it so chooses to file suit in

state court, claiming interference with prospective economic advantage, a cause of action recognized in Illinois. *See, e.g., Voyles v. Sandia Mortgage Group,* 196 Ill.2d 288, 300 (2001). All that would be lost to Phoenix Bond in such a suit would be the opportunity to brand one's competitor as a "racketeer" and to seek treble damages and fees.

Moreover, dismissing the RICO claims will allow Cook County to play a larger role in overseeing its tax lien auction proceedings. Because the bidding rules at issue were promulgated by the Treasurer's Office, it is most appropriate that that office – not the federal courts – take the lead role in interpreting those rules. Bidders found to have violated the rules can be subjected to sanctions of Cook County's devising, including exclusion from future auctions. Alternatively, even if Cook County determines that Bridge violated its bidding rules, it should be free to decide that those violations did not harm the county and imposition of a sanction would be inappropriate.

Phoenix Bond argues that the Treasurer's Office cannot suffer any injury as a result of Bridge's alleged misconduct and thus lacks any incentive to police the bidding system. WLF is highly skeptical on both points. Cook County will be injured if it develops a reputation for conducting biased tax lien auctions; such a reputation could well lead to a reduction in the number of bidders and possible reduction in revenues generated at auctions. Thus, Cook County has a strong incentive to ensure that all bidders are treated fairly.

In sum, dismissing Phoenix Bond's RICO complaint based on failure to allege reliance/proximate

cause will not prevent Appellees and Cook County from pursuing appropriate remedies, and it might well prevent competitors from using the courts to stifle competition.

III. A RELIANCE REQUIREMENT WILL HELP ENSURE THAT RICO DOES NOT SWALLOW UP STATE TORT LAW

Although RICO was adopted for the purpose of providing new tools with which to fight organized crime, all agree that the civil RICO provision, 18 U.S.C. § 1964(c), has never been used for that purpose. Instead, the ever-increasing number of civil RICO suits filed each year for the most part target large, on-going concerns that would not fit most people's definition of racketeers.

The attractiveness of RICO as a vehicle for plaintiffs and the plaintiffs' bar is easy to discern. It promises recovery of costs, including attorney fees, to prevailing plaintiffs. Prevailing plaintiffs are also entitled to treble damages. They can threaten to use the provocative portion of RICO's title (racketeering) to coerce settlements from companies who may fear the loss of goodwill that may accompany a public disclosure that the company has been accused of "racketeering activity." Because RICO is drafted broadly, plaintiffs' attorneys can now file as RICO claims in federal court a large percentage of the commercial disputes that formerly were filed in state courts. *See, e.g.*, Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 626 (1990) ("Taking section 1961's definitions and reading them back into § 1962's substantive

prohibitions, it becomes readily apparent that RICO is indeed a statute that covers an immense range of activity. Once a clever lawyer can characterize an opponent's actions as constituting one or two of the myriad of predicate acts, it takes little imagination to deem those actions RICO violations.").

WLF does not mean to suggest that the Court ought to read RICO in a crabbed manner for the purpose of restricting the range of its coverage. To the contrary, WLF recognizes that it is not the role of the Court to re-write RICO, that any deficiencies in the statute should be corrected by Congress instead of the courts. As the Court held in *Sedima*:

> It is true that private civil actions under [RICO] are being brought almost exclusively against [respected and legitimate enterprises], rather than against the archetypical, intimidating mobster. Yet this defect – if defect it is – is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.

Sedima, 473 U.S. at 499-500 (footnote omitted).

Nonetheless, the elimination of a reliance requirement would be such a dramatic expansion of mail and wire fraud actions under RICO that the Court

should carefully consider whether Congress could really have intended that result.

Summit Properties Inc. v. Hoechst Celanese Corp., 214 F.3d 556 (5th Cir. 2000), is a good example of the RICO-ized product liability suit one can expect to migrate from state to federal court if reliance requirements are eliminated in fraud suits. In *Summit*, the Fifth Circuit dismissed for lack of reliance a RICO suit filed against manufacturers of polybutylene plumbing and components. The plaintiffs alleged that the product was defective and damaged real estate in which it was installed, but they had never had any dealings with the manufacturers and thus never had occasion to hear, let alone rely on, any misrepresentations the defendants may have uttered. Judge Higginbotham began his opinion for the appeals court as follows:

> Today we are invited to read RICO as establishing a federal products liability scheme complete with treble damages and attorney fees for the benefit of end-users of defective products who never relied on manufacturers' alleged misrepresentations of product quality. We are unpersuaded that RICO can be extended so far by such a marriage of distinct duties and liability regimes.

Summit, 214 F.3d at 557. But if the Court affirms the Seventh Circuit, the federal courts will need to prepare for such a marriage. If the reliance requirement for plaintiffs is eliminated in mail and wire fraud cases, nationwide RICO class actions will abound (reliance

requirements are often the principal impediment to certification because they generally preclude a Rule 23(b)(3) finding that common issues of fact and law predominate) and businesses will be accused of defrauding millions of consumers whom they never have met or even contacted.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court reverse the judgment of the court of appeals.

Respectfully submitted,

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